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THE  
ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1909. *1062*

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VOL. XVIII.

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## ERRATA.

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Page 9, 8th line from bottom, for "5 Q.B.D. 76," read "5 Q.B.D. 26."

" 121, 2nd line of head-note, for "issued," read "secured."

" 143, 12th line from top, for "26 A.R. 401," read "26 A.R. 431."

" 150, 9th line from top, for "112," read "412."

" 159, 1st line of page, for "(1894)," read "(1895-6)."

" 159, 2nd line of page, for "26 A.R.," read "23 A.R."

" 236, 7th line from top, for "540," read "541."

" 245, 9th line of head-note, for "\$200," read "\$250."

" 338, 6th and 7th lines from top, for "*London and North-Eastern R.W. Co.*," read "*Great Western R.W. Co.*"

" 472, 4th line of head-note, for "plaintiff," read "defendant."

" 562, 13th line of head-note, for "531," read "521."



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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

REX V. REEDY.

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*Intoxicating Liquors—Conviction—Motion to Quash—Appointment of Police Magistrate—Jurisdiction before Issue of Commission—Appointment for Town in Unorganized District—Jurisdiction of Police Magistrate so Appointed—Jurisdiction as Ex Officio Justice of the Peace—Police Magistrates Act—R.S.O. 1897, ch. 87, secs. 6, 22, 30.*

Under the Police Magistrates Act, R.S.O. 1897, ch. 87, sec. 6, conferring power on the Lieutenant-Governor in Council to appoint police magistrates, the effective act of appointment is the Order in Council, and police magistrates so appointed have jurisdiction to act as such before their commissions are issued.

Under sec. 6 of the said Act, by which "the Lieutenant-Governor in Council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town," such appointment may be made for a town made such by proclamation, with less than 5,000 inhabitants, in an unorganized district before a council has been elected for it, notwithstanding that by sec. 3 (2) no salaried police magistrate shall be appointed for a town with less than 5,000 inhabitants until a resolution of the council affirming the expediency thereof is passed by a vote of two-thirds of the members of the council.

Such magistrate has jurisdiction to act, notwithstanding that there may be another police magistrate appointed for the part of the unorganized district in which the town to which he has been appointed is situate, and this, though he is *ex officio* a justice of the peace, since jurisdiction of a justice of the peace in such a district to adjudicate upon or otherwise act, until after judgment in any case, is excluded (by sec. 22) only if the initiatory proceedings have been taken by or before the police magistrate for the district or part of the district.

On motion to quash a conviction for unlawfully keeping liquor for purposes of sale without a license therefor:—

*Held*, that the magistrate making such conviction, being a police magistrate for the town of Cobalt, correctly described himself as making the conviction as such police magistrate, although, in making it, he was acting in his capacity as *ex officio* justice of the peace for the district of Nipissing. *Held*, also, that in this case the conviction must be quashed on the ground that no offence was disclosed upon the evidence: and *Regina v. McGregor* (1895), 26 O.R. 114, distinguished in that regard.

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THIS was a motion, on behalf of E. J. Reedy, to quash a conviction for an offence against the Liquor License Act, which conviction was made by R. H. C. Brown, a police magistrate for the town of Cobalt, under the circumstances mentioned in the judgment. The motion was argued before MEREDITH, C.J.C.P., BRITTON and RIDDELL, JJ., on November 27th, 1908.

*J. B. MacKenzie*, for the applicant, contended that there could be no police magistrate for a town in an unorganized district where no council had been elected; that the commission appointing the magistrate bore date subsequent to the conviction; that in any event the police magistrate had no jurisdiction outside the town of Cobalt; that the punishment awarded was excessive; and that there is no power to amend: Liquor License Act, R.S.O. 1897, ch. 245, sec. 105; *Regina v. Black* (1878), 43 U.C.R. 180.

*J. R. Cartwright*, K.C., for the Crown, contended that Brown's appointment was properly shewn by production of the Order in Council; and that he had authority under sec. 23 of the Act: *Hunt qui tam v. Shaver* (1895), 22 A.R. 202. He also referred to 2 Edw. VII. ch. 12, sec. 15 (O), and to sec. 1124 of the Criminal Code, R.S.C. 1906, ch. 146, and to *Regina v. McGregor* (1895), 26 O.R. 115.

*MacKenzie*, in reply, cited *Regina v. Rose* (1882), 22 N.B. 309; *Regina v. Lynch* (1886), 12 O.R. 372; *Regina v. Higgins* (1889), 18 O.R. 148; *Queen v. Allbright* (1881), 9 P.R. 27; *Regina v. Tucker* (1888), 16 O.R. 127; *Regina v. Wright* (1887), 14 O.R. 668; *Rex v. Simmons* (1908), 12 O.W.R. 776; *Regina v. Cantillon* (1890), 19 O.R. 197; *Webb v. Ross* (1859), 4 H. & N. 111.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.:—By the conviction returned it appears that the applicant was convicted before Mr. Brown, as police magistrate in and for the town of Cobalt, in the district of Nipissing, for having, on September 8th, 1907, in the township of Carr, in the district of Nipissing, on his premises, unlawfully kept liquor for the purpose of sale, barter, and traffic therein, without the license therefor required.

By the conviction the magistrate imposed a penalty of \$50 and a sum of \$ , as it appears by the conviction—that may be a mistake—for costs, and adjudged that, upon failure to pay the fine and costs forthwith, the applicant should be imprisoned without hard labour in the common gaol at North Bay, and there be kept for 3 months, unless the fine and costs were sooner paid.

Various objections have been made to the conviction, some of them based upon the absence of any jurisdiction in Mr. Brown to entertain the complaint or to make the conviction.

One of these objections is that Mr. Brown was not appointed police magistrate for the town of Cobalt until after the date of the proceedings which are in question. A copy of his commission was put in, which bears date October 18th, 1907, and, if that were the governing date, it is a date subsequent to the adjudication, but the Order in Council appointing him was put in, and that bears date January 11th, 1907, so that, if the Order in Council is, as we think it is, the effective act by which the appointment was made, the power being conferred under the Act upon the Lieutenant-Governor in Council to appoint a police magistrate, the objection fails.

Then it is said that Cobalt was not at that time a town. Cobalt had been by proclamation erected into a town prior to the date of the proceedings, but it is argued that, because there was no council at that time, it was not a town within the meaning of the Act.

I fail to follow or appreciate the argument of Mr. Mackenzie upon that point. The Act is perfectly clear, I think, and the meaning to be given to the words of the section, I think, are plain, and admit of no question.

Section 6 of the Police Magistrates Act, R.S.O. 1897, ch. 87, provides that “the Lieutenant-Governor in Council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town.”

Cobalt was erected into a town by proclamation, and I think it is not necessary to follow the argument that, because there is in this Act a provision that the council of a town with a population of less than 5,000 may ask for the appointment of a police magistrate and fix the salary to be paid, it follows that the pro-

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visions of the Act cannot be applied until a council has been elected.\* It seems plain that, where there is an existing town, the powers conferred upon the Lieutenant-Governor by sec. 6 may be exercised.

The next objection to the jurisdiction of the magistrate was that there was a police magistrate appointed for the part of the district of Nipissing where the offence was committed—Macdougall's Chute, in the township of Carr—and, that being so, it was argued that Mr. Brown had no jurisdiction over the offence or to try the offence within the territorial jurisdiction of the magistrate appointed for that part of the district.

We think there is nothing in that objection. The provisions of the Act are clear, subject to what I shall say as to the powers conferred by sec. 30.

By sec. 30 a police magistrate, sitting as such, has "power to do alone whatever is authorized by any statute in force in this Province, relating to matters within the legislative authority of the legislature of the Province, to be done by two or more justices of the peace; and every police magistrate shall have such power"—i.e., the power to do alone whatever is authorized by any statute in force in this Province relating to matters within the legislative power of the Province, to be done by two or more justices of the peace—"while acting anywhere within the county for which he is *ex officio* a justice of the peace."

There is nothing in the Act to exclude the jurisdiction of the magistrate in the territory for which the police magistrate for the part of the district of Nipissing in which Macdougall's Chute was situate was appointed.

The provisions of sec. 7, which deal with the case of a city or town, are that "no justice of the peace shall admit to bail, or discharge a prisoner, or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the court of general sessions of the peace, or in the case of the illness, absence, or at the request of the police magistrate;" so that the jurisdiction of the justice is excluded in those cases.

\* R.S.O. 1897, ch. 86, sec. 3 (2):—No appointment of a salaried police magistrate shall in the first instance be made for a town not having more than 5,000 inhabitants, until a resolution of the council affirming the expediency thereof is passed by a vote of two-thirds of the members of the council. . . .

Then, by sec. 15: "(1) Where the county council of a county passes a resolution affirming the expediency of the appointment of salaried police magistrates, or a salaried police magistrate, for the county or part of the county, the Lieutenant-Governor may from time to time make such an appointment, the salary to be paid by the county."

Then, by sec. 17: "In a county in which there is a police magistrate appointed under sec. 15, no justice of the peace shall admit to bail or discharge a prisoner," etc., following the language of sec. 7.

But, when the case with which we have to deal is dealt with, the provision is entirely different. Section 19 is the section, and it is: "The Lieutenant-Governor may appoint more police magistrates than one for any county or union of counties or district or part of a district," etc. Then the provision, analogous to secs. 7 and 17, is that in sec. 22: "No justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act until after judgment in any case prosecuted under the authority of any statute of Ontario where the initiatory proceedings were taken by or before a police magistrate;" so that, in the case of the police magistrate as appointed by the Lieutenant-Governor for part of the district of Nipissing, the jurisdiction of a justice of the peace for the district is excluded only if the initiatory proceedings had been taken by the police magistrate for the district, or part of the district, which was not the case in regard to the prosecution in this case.

The only question remaining upon this branch is as to whether Mr. Brown, under the provisions of sec. 30, had authority to make the conviction, and whether he properly describes himself in making it as police magistrate for the town of Cobalt.

It is quite clear that, under the provisions of sec. 30, he had all the powers conferred by sec. 30, while acting anywhere within the district for which he is *ex officio* a justice of the peace, and he is *ex officio* a justice of the peace for the district of Nipissing.

According to the decision of the Court of Appeal in *Hunt v. Shaver*, 22 A.R. 202, he was acting, while exercising this jurisdiction, as police magistrate for the town of Cobalt, and so properly described himself.

In *Hunt v. Shaver* the question was as to whether a police

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magistrate for a village, who was *ex officio* a justice of the peace for the county in which the village was situate, was exempt from making the return of convictions which is required to be made by justices of the peace; and it was held that he was not. The judgments are short, and I may, therefore, read what was said. The Chief Justice of Ontario said (p. 204): "I have no doubt as to the correctness of the judgment appealed from, and the appeal must therefore be dismissed. A police magistrate, it is true, may *ex officio* act as a justice of the peace, but when he acts he acts not strictly as a justice of the peace, but as a police magistrate, and convictions made by him are made by him in that capacity, so that no return of the conviction to the clerk of the peace is necessary." Mr. Justice Osler said (p. 204): "I am of the same opinion. Section 6 of R.S.O. 1887, ch. 77 gives individual exemption. The police magistrate has the powers of a justice of the peace, but when he acts he acts as a police magistrate." Mr. Justice Maclellan concurred in the judgment.

All these objections, therefore, fail; but other objections remain to be considered: (1) Whether upon the papers returned there was any evidence which warranted a conviction for the offence of which the applicant was convicted; and (2) whether, assuming that there was that evidence, the Criminal Code applies so as to enable the Court to amend the conviction with regard to the punishment imposed, which, it is admitted by Mr. Cartwright, was in excess of the authority of the police magistrate.

We think it is unnecessary to express any opinion upon the second question, because we are of opinion that the first objection argued by Mr. Mackenzie—that no offence was disclosed upon the evidence—is entitled to prevail.

All that is returned by the magistrate as the evidence before him is a document headed "Copy of evidence, *Rex v. Reedy*," and reading: "J. J. Reedy, charged with unlawfully keeping liquor for the purpose of sale, barter, and traffic therein without the license therefor by law required. Pleads not guilty. G. E. Morrison, sworn: Visited Reedy's pool room, and saw bar, glasses, etc. Had all kinds of soft drinks. Produced invoice from wine company. Got a barrel of cider containing a good part of alcohol. J. J. Reedy, sworn: Admitted having the goods as represented by Mr. Morrison, but said, 'I did not buy it for alcohol.'"



There is nothing in all this to shew that the evidence was directed to the act of the applicant upon which the charge was based. For all that appears, what was deposed to by Morrison, and what is admitted by Reedy, may have had application to a different time and a different place.

Mr. Cartwright relies upon *Regina v. McGregor*, 26 O.R. 115, for the Court reading the evidence in connection with the information and as referring to the time and place mentioned in it. But the case does not support that contention. The question in *Regina v. McGregor* was as to the jurisdiction of the magistrate. It was contended that there was nothing upon the face of the proceedings to shew that the offence of which the defendant was convicted was committed within the district of Nipissing. It appeared by the papers returned that this minute preceded the depositions returned. "Sept. 6. Magistrate's court at North Bay 3 this p.m. Mrs. McGregor appeared charged with unlawfully selling liquor at her house, in the township of Dunnet, on the 10th August, 1894. The charge having been read over to her, she pleaded not guilty." The Court, in delivering judgment, said: "It may well be that the charge read over to the defendant was the charge as stated in the warrant under which she had been apprehended, and, if that be so, it was to that charge that the evidence was directed, and the description of the place where the offence was committed is shewn to be in the township of Dunnet, which we know judicially to be within the district of Nipissing; and sufficient, therefore, appears to enable us to say that, upon a perusal of the depositions, we are satisfied that an offence of the nature described in the conviction was committed over which the justice had jurisdiction, and that without in any way questioning the correctness of the decision in *Regina v. Young*, already referred to."

The case does not disclose what the evidence was or what the depositions returned shewed; but I apprehend that, upon looking at the papers, it will be found that they were not as bald as the depositions here, and that the only vice, if vice there was in them, was that the evidence did not in terms point to the place where the act charged was done as being in the township of Dunnet, and therefore within the jurisdiction of the magistrate.

We do not think that this case applies, and, while it is very

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would not assist the arbitrator in deciding the value at the present time; that, at any rate, the arbitrator was not bound to receive the evidence: *North and South-Western Junction R.W. v. Assessment Committee of the Brentford Union* (1888), 18 Q.B.D. 740, 13 App. Cas. 592; that the Court ought not to interfere with the arbitrator unless there was almost misconduct on his part, or unless the evidence was such as, if embodied in the award, would entitle a party to have the submission revoked: *In re Small and St. Lawrence Foundry Company* (1896), 23 A.R. 543, at p. 547; *In re Jenison and Kakabeka Falls Land and Electric Company* (1898), 25 A.R. 361; *In re Marsh* (1847), 16 L.J.Q.B. 330; Redman on Awards, 3rd ed., pp. 140, 141; Russell on Awards, 9th ed., p. 154; that here the arbitrator proposed to take other evidence, which would arrive at the result aimed at, and it was a mere question of marshalling the evidence; that if the evidence would be of no use to the arbitrator, he was not bound to receive it: *Trent-Stoughton v. Barbados Water Supply Company*, [1893] A.C. 502; Cripps on Compensation, 5th ed., p. 108; that it was the policy of the Act to leave much to the discretion and good sense of the arbitrator.

*E. D. Armour*, K.C., for the heirs of Rogers, the landlord, stated that the arbitrator had rejected the evidence, not on the ground that it would have no effect on him, but that he was compelled by law not to admit it, and seemed to think that the basis of value was the cost of the building, subject to certain allowances for depreciation, and contended that this was an incorrect method; that the building was erected for letting purposes, and the true test was the income it would bring: *Hart v. Duke* (1862), 32 L.J.Q.B., at p. 55; that an arbitrator may be compelled to receive the evidence *pendente lite*, though after the award is made, its rejection would not be ground for setting it aside: *Robinson v. Davies* (1879), 5 Q.B.D. 76; *East and West India Dock Company v. Kirk and Randall* (1887), 12 App. Cas. 738; that the duty of the Court is to control the arbitrator while the arbitration is going on: *Tabernacle Permanent Building Society v. Knight*, [1892] A.C. 298; *Attorney-General v. Davison* (1825), 1 McL. & Y. 160, at p. 161; that the question here was whether the desired evidence was legally admissible: *Dalton v. City of Toronto* (1906), 12 O.L.R. 580; *McGoldrick v. The King* (1902),

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December 19. The judgment of the Court was delivered by MEREDITH, C.J.:—The reference is for the purpose of determining the value of the buildings and appurtenances erected by the company upon certain land demised to them by the heirs of Rogers, on January 12th, 1887, which, in the events that have happened, the lessors are to pay to the lessees when ascertained by arbitration, as provided by the lease.

On the reference, counsel for the lessors called upon Mr. Wadsworth, the manager of the lessee company, whom they called as their witness, to produce the books of his company in which were entered the income and expenditure connected with the leasehold premises during the term, the object being, as stated by counsel, to shew what the revenue derived by the company from the premises was.

Counsel for the lessors objected to testimony of that character being adduced, contending that it was not relevant or admissible on the inquiry which the arbitrator was charged with, viz., the determination of the value of the buildings.

The arbitrator gave effect to the objection, and ruled that the evidence proposed to be given was inadmissible, whereupon counsel for the heirs of Rogers requested him to state a special case for the opinion of the Court as to the correctness of his ruling, which the arbitrator decided to do.

The question submitted by the special case is:—

“Whether the evidence of rentals or other income heretofore actually received from the buildings by the company and all outgoings or expenditure in respect thereof should be admitted as evidence by me in order to shew the value of the buildings under the said lease and submission.”

We are of opinion that the evidence tendered by the lessors was admissible and ought to have been received. That it was relevant does not, we think, admit of any question, though it may turn out, when it is in, that, owing to exceptional circum-



stances, the revenue derived by the lessees may not assist the arbitrator in fixing the value of the buildings.

The arbitrator has, we think, failed to mark the distinction between the admissibility of the evidence and the weight to be given to it.

Under ordinary circumstances, the revenue derived from a building during a long period would be of assistance to an arbitrator in determining its value, yet there might conceivably, and in this case there may be, circumstances not yet developed that would shew that no assistance whatever was afforded by having that information before the arbitrator.

That a question as to the admissibility of evidence is a question of law within the meaning of sec. 41 does not admit of doubt. If authority be needed, *Attorney-General v. Davison*, 1 McCl. & Y. 160; *Hart v. Duke*, 32 L.J.Q.B. 55; *Robinson v. Davies*, 5 Q.B.D. 26, may be referred to.

Section 41 has two objects—one to enable the arbitrator of his own motion to obtain the opinion of the Court on a question of law arising in the course of the reference, and the other to enable the Court to require him to state in the form of a special case such a question for their opinion, the latter power being conferred to enable the Court to exercise a certain control over the proceedings before the arbitrator.

The old method of accomplishing what is sought by an application to the Court under the section was to apply for leave to revoke the authority of the arbitrator, and this is spoken of by Lord Halsbury, in *Tabernacle Permanent Building Society v. Knight*, [1892] A.C. 298, at p. 301, as obviously a clumsy and incomplete remedy.

The exercise of the power conferred by sec. 41 rests in the discretion of the Court, and it may be that, though the Court might give their opinion upon a question when asked by the arbitrator to do so, the Court might refuse to require him to state the same question for their opinion if he were unwilling to do so, but as to this it is unnecessary to express an opinion.

The question of setting aside an award because the arbitrator has mistakenly rejected evidence which he ought to have received is a very different one, and the rule, no doubt, is that if in such a case the parties wait until the arbitrator has made his award,

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the Court will not set aside the award; and it was on this principle that *In re Marsh*, 16 L.J.Q.B. 330, cited by Mr. Shepley, was decided. The rule is based upon the view that the arbitrator is the judge of both the law and the fact chosen by the parties, and that his award ought not to be set aside for mistakes either as to the law or the fact, but, if it is in accordance with the terms of the submission, for misconduct only.

Our answer to the question submitted is that evidence of the rentals and other income actually derived by the lessees from the buildings during the term and of the outgoings and expenditure in respect thereof should have been admitted as relevant to the inquiry before the arbitrator.

A. H. F. L.

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HIGGINS V. THE CANADIAN PACIFIC R.W. CO.

*Railways—Sheep Escaping to Adjoining Farm and thence upon the Railway Track—Injury Thereto—Opening under Gate at Farm Crossing—Openings also in Fence.*

The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a farm crossing on the adjoining owner's farm which had been raised by the defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track:—

*Held*, that the defendants were liable under sec. 294 (4), even assuming that the sheep got upon the track through the opening under the gate.

The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway premises.

THIS was an appeal by the defendants to a Divisional Court from the judgment of the county court of the county of Simcoe in favour of the plaintiff in an action tried with a jury.

The facts are fully set forth in the judgment of Riddell, J.

The appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on November 5th, 1908.

*Shirley Denison*, for the appellant. Section 294 (4) of the

Railway Act, R.S.C. 1906, ch. 37, does not apply. The sheep must be at large on some highway or public place, and thence get upon the railway premises. These words were taken from the Pounds and Fencing Acts, the words first appearing in the Pound Act of 1857, and in the construction which has been placed on them, the above meaning was given to them. When used in the Railway Act, they must receive the same construction: *Ives v. Hitchcock* (1830), Drap. Rep. 247; *Fensom v. Canadian Pacific R.W. Co.* (1904), 7 O.L.R. 254; *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63; Ontario Bureau of Industries Report, 1897, by C. C. James, Adolphustown, pp. 1 to 18; *McSloy v. Smith* (1895), 26 O.R. 598. The plaintiff's rights, if any, depend on sec. 254. There can be no recovery under that section. The evidence shews that the sheep escaped by getting under Craig's gate, which had been raised by the defendants at Craig's request. Craig could not have maintained an action had the sheep been his and they had escaped from his land by this opening; and the plaintiff, as a licensee of Craig, can be in no better position: *Kilmer v. Great Western R.W. Co.* (1874), 39 U.C.R. 595; *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; *Clayton v. Great Western R.W. Co.* (1873), 23 C.P. 137. The Court can supplement the finding of the jury on this point: Con. Rule 615; and this would dispose of the case: *Smith v. Canadian Express Co.* (1906), 12 O.L.R. 84. In any event there should be a new trial.

*A. E. H. Creswicke*, for the respondent. Section 294 (4) has not the effect contended for by the appellants. The words "at large" are not limited to sheep at large on a highway. The additional words contained in the section, "whether on the highway or not," clearly shew this; and therefore the section covers the case of the sheep being at large on Craig's land: *Carruthers v. Canadian Pacific R.W. Co.* (1907), 39 S.C.R. 251. The evidence does not justify a finding that the sheep got through the opening under the gate and not through an opening in the fence. In any event, the Court cannot assume the function of the jury and make a finding on this point. Under sec. 294 (4), the plaintiff is entitled to recover unless negligence on the plaintiff's part is proved. The onus of proving such negligence is on the defendants, and they have failed to prove any

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such negligence: *Carruthers v. Canadian Pacific R.W. Co.*, 39 S.C.R. 251. The judgment, therefore, was properly entered for the plaintiff.

November 12. RIDDELL, J.:—The plaintiff had a flock of sheep upon his farm in the township of Medonte. The sheep broke out of the small field in which they were enclosed into the farm of a neighbour, one Craig. Through the land of Craig runs the line of the defendants' railway. By a verbal agreement with Craig the gate between Craig's field and the railway land was raised 18 inches to 2 feet 5 inches from the ground. I assume in favour of the defendants that it was under this gate that the sheep made their way upon the railway line—the jury were not able to say whether it was so or whether the sheep made their way through defects in the fence. The sheep did make their way upon the line of rail and were killed. There was no "negligence or wilful act or omission of the owner or his agent" proved: sec. 294 (4) of the Railway Act. Upon the findings of the jury, the learned county court Judge at Barrie directed judgment in favour of the plaintiff for the value of the sheep killed as found by the jury. The defendants now appeal.

The statute which, in my view, governs the case is R.S.C. 1906, ch. 37, sec. 294 (4): "When any . . . sheep . . . at large, whether upon the highway or not, get upon the property of the company and are killed . . . by a train, the owner of any such animal so killed . . . shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss . . . against the company . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner, or his agent, or of the custodian of such animal or his agent." The defendants argue that the sheep in the present instance did not come within the meaning of the words "sheep . . . at large," and claim that the right, if any, of the plaintiff, must be under sec. 254; that, consequently, his rights are no higher than those of Craig, and Craig could not claim because the defect was due to his own request and agreement.

I am not able to give effect to that contention.

The history of the legislation is with sufficient detail and accuracy stated in MacMurchy & Denison's *Railway Act*, pp. 452 *seq.*, and is discussed in the judgments of the Manitoba Court in *Carruthers v.*

*Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 323. This Division had occasion to consider the state of the law as it was before the revision of 1906, in *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; and the Supreme Court of Canada had the same matter before them in *Canadian Pacific R.W. Co. v. Carruthers*, 39 S.C.R. 251. Any doubt which there might have been, had the Act remained as it was before the revision, can, in my opinion, no longer remain. It is clear that an animal may be at large at places other than upon a highway, and I have no doubt that an animal is "at large," within the meaning of the statute, when it has broken its way into the field of an owner adjoining.

The provisions of the Act are plain enough. A railway company has the power to cross a highway (sec. 254); it must erect and maintain cattle guards on each side of the railway at the crossing and turn the fences in to the cattle guards, the fences and cattleguards being suitable and sufficient to prevent cattle and other animals from getting off the highway upon the railway. All persons are forbidden (sec. 294) to permit cattle, etc., from being at large upon a highway within half a mile of the railway crossing; and if animals are so allowed to be at large and are killed at the intersection, the railway is not liable. But if the railway have neglected the provisions of sec. 254, and either the fences or cattle guards should be wanting or so defective that the animal gets upon the railway from the highway and is killed, the railway must pay for the result of such a disobedience of the statute.

Moreover (sec. 254), the company must erect and maintain upon the railway property along the sides thereof a fence suitable and sufficient to prevent cattle, etc., from getting upon the railway. If any adjoining proprietor desire something different or less he may induce the company to depart from the express provisions of the Act; and if he suffer therefrom, he cannot complain: *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; nor can his tenant, or perhaps any one claiming a right in the land by, through or under him. But he cannot deprive other people of their rights; and one of these rights is that their cattle, if they should get at large, shall be kept from the railway property by a railway fence built and maintained according to the Act.

No advantage would arise from a consideration of the cases decided before the Act of 1903; the Courts in the several

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Provinces of the Dominion did not agree as to the person who was entitled to the advantage and benefit of the fencing clauses. As the statute stands, if any animal gets upon the railway from an adjoining piece of land, such animal being the property of the owner of the land, his tenant or licensee, the rights of the owner of the animal depend upon sec. 254 (*Yeates v. Grand-Trunk R.W. Co.*); if the animals are, without the will of its owner, trespassing upon the piece of land, the case is governed by other considerations; then the railway is liable unless the act of some one for whom they are not responsible has intervened, as set out in sec. 295.

To put the matter in another way—as it seems to me, Parliament has said to the railway company: “We, for your advantage and to the advantage of the public, prohibit the running at large of animals upon the highway near your crossings, and if any animals do get at large and get upon your line at a point at which you can not fence against them, *i.e.*, at the intersection, you will not have to pay for them if they are there killed. But animals will stray; if this straying is the fault of the owner we shall let him bear the loss if his animals are killed upon your line; if, however, he is not to blame, you must pay if you do not keep them off by fence and cattle guards.” And the Courts add: “If any land owner wishes something different from the statutory provisions, you may make a bargain with him, and he will not be allowed to complain, nor will any one claiming by, through and under him.” That, however, is as far as the Courts have gone, and I think in view of the words of the statute that is as far as we can go.

And while we are not technically bound by the decision of the Supreme Court in the *Cunningham* case, the reasoning of that Court—that of the majority of the Manitoba Court of Appeal—is irresistible in the present wording of the Act.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

G. F. H.

## [DIVISIONAL COURT.]

OSTRANDER V. JARVIS.

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Jan. 22.

*Principal and Surety—Banks and Banking—Crediting Customer with Amount of Note—Discount—Collateral Security—Separate Instruments—Sureties in Different Amounts—Contribution by Sureties.*

A bank, wishing to close an account on which a balance of \$1,000 of advances to the customer remained unpaid, took a joint and several demand note for \$1,000 of the customer and another as surety, payable to it, with interest, and credited the customer's account with its face value, writing the word "disc." before the credit entry:—

*Held*, that it was open to the bank to shew that the note was in fact taken by it as collateral security merely, and not in payment of the balance due so as to release the accommodation makers of two other notes held by it as collateral security in respect to the same account.

Sureties by different instruments for the same principal debt are liable to contribute in proportion to the respective amounts for which they have agreed to be sureties.

A person as surety made a note for \$3,000 to be held by a bank as security for advances to be made to a customer, and the ultimate balance thereof, and two others, as sureties, made a joint and several note for the like amount and for the same purpose, and another, as surety, made a note for \$1,000 for the same purpose:—

*Held*, that they were liable to contribute respectively in the proportion of three-sevenths, three-sevenths and one-seventh of the ultimate balance requiring to be paid off.

THIS was an appeal from the judgment of His Honour Judge Morrison, Judge of the county of Prince Edward, in this action, which was a High Court action tried before him by consent of parties under the Act, 6 Edw. VII. ch. 20 (O.). The action was brought under the following circumstances:—

One W. T. Scott opened an account at the Metropolitan Bank at Picton with a view to obtaining advances, and deposited as collateral security a promissory note of the defendant, Jarvis, for \$3,000, in favour of the Metropolitan Bank, and declared by letter of hypothecation of same date to be intended to secure the said account and the ultimate balance thereof. Later on, the bank manager being dissatisfied with the account, Scott got his father and mother-in-law, Hiram and Frances Ostrander, to sign a joint and several note for \$3,000, payable to his order, which he endorsed over in like manner to the Metropolitan Bank, to be held as additional collateral security for advances made or to be made to Scott, and the ultimate balance thereof, a similar letter of hypothecation being taken at the same time from Hiram and Frances Ostrander. The account went on, but the bank



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manager again became dissatisfied, and, in May, 1908, demanded from Scott that the account should be closed, the balance then being \$1,000, represented by two demand notes of Scott for \$500 each. Scott then brought his brother-in-law, Everett Ostrander, the son of Hiram and Frances Ostrander, to the bank, and these two made a joint and several promissory note payable on demand for \$1,000 in favour of the bank, and delivered the same to the bank manager. No letter of hypothecation, however, was taken in connection with this last-mentioned note. Afterwards Scott paid \$250 in all in respect to this last-mentioned note, and then the balance of \$750 and interest was, on August 28th, 1908, paid by Frances Ostrander, as it would appear, out of the common purse of the Ostranders, who all worked on the same land, the account, however, standing in the name of Frances Ostrander in the Metropolitan Bank.

Hiram and Frances then commenced this action against Jarvis claiming contribution from him as a surety with themselves in respect to the ultimate balance of \$1,000 due from Scott to the bank at the time the said \$1,000 note was taken.

The bank account of Scott shewed on its face an entry to the credit of the account of \$1,000 at the time the note of Everett Ostrander and Scott was taken with the word "disc." before it.

The learned county court Judge, at the trial, added Everett Ostrander as a party plaintiff, and held that, as a fact, the Bank took the \$1,000 note of Everett Ostrander and Scott merely as additional collateral security, and gave judgment in favour of the plaintiffs against Jarvis for one-half the said sum of \$750, with interest, as contribution due from him as surety.

The defendant appealed to the Divisional Court, and the motion was argued on January 21, 1909, before BOYD, C., BRITTON and MAGEE, JJ.

A. H. F. Lefroy, K.C., for the defendant, contended that it was, on the authorities, not open to the bank to contend that they took the \$1,000 note merely as security, but that the bank must be held to have become purchasers for value of the note, and to have placed the value to the credit of the account, and so to have paid off the overdraft and released Jarvis as surety: *In re Carew*



*Estate Act* (1862), 31 Beav. 39, cited Grant on Banking, 5th ed., at p. 295; *Currie v. Misa* (1875), L.R. 10 Ex. 153; *Capital and Counties Bank v. Gordon*, [1903] A.C. 240, especially at pp. 245, 248, 249; *Bissell & Co. v. Fox Bros. & Co.* (1885), 53 L.T. 193, cited Hart on Banking (1904 ed.), at p. 289; *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715; *Ex parte Richdale* (1881), 19 Ch.D. 409; and that, in any event, even if the \$1,000 note was to be considered merely as collateral security, the defendant was only one of four sureties, and therefore could only be called upon to contribute one-fourth.

W. E. Middleton, K.C., for the plaintiff, contended that the evidence of the bank manager shewed that he only took the \$1,000 from Everett Ostrander and Scott as collateral security, but cited no cases on this point, and did not comment on the cases cited for the defendant; and that the proper proportion contributable by Jarvis was one-seventh, upon the principle that the amount of contribution to which different sureties are liable is proportionate to the amount for which each is surety: *Dering v. Lord Winchelsea* (1787), 1 Cox 318; *Ellesmere Brewery Co. v. Cooper* (1896), 1 Q.B. 75; *In re MacDonaghs* (1876), 10 Ir. Rep. Eq. 269; *Pendlebury v. Walker* (1841), 4 Y. & C. (Exch.) 424, at p. 441.

Lefroy, in reply, contended, upon the point of contribution that the rule in the cases cited only applied where parties became sureties for an uncertain amount, as, for example, for the good conduct of someone who was in a position of trust, but that in this case the amount was fixed—namely, \$1,000—when Everett Ostrander became, as held, an additional surety for that amount, and, as the account was then and there closed, there was no object in Everett Ostrander's note being made more than \$1,000, and that all the four sureties were bound to contribute equally.

January 22. The judgment of the Court was delivered by BOYD, C., holding that there was enough on the evidence to justify the finding that the bank took the \$1,000 note of Everett Ostrander and W. T. Scott as security merely, and proceeding as follows:—The principle of contribution among co-sureties does not rest on contract, but upon principles of equity, which may be modified by the extent to which each has engaged himself. As put by the Lord Chief Baron Eyre, in *Dering v. Lord Winchelsea*,

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1 Cox 318, at p. 321: "It is clear that one surety may compel contribution from another towards payment of the debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of the joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by different instruments, but for the same principal and for the same engagement? In all these cases the sureties have a common interest and a common burthen; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with the difference only that the penalties will ascertain the proportion in which they are to contribute, whereas if they are joined in one bond, it must have depended on other circumstances.

In the report given in 2 B. & P., at p. 273,\* this last sentence is thus expressed: "They are bound as effectually *qua* contribution as if bound in one instrument, with this difference only, that the sum in each instrument ascertains the proportions, whereas if they are all joined in the same engagement, they must all contribute equally."

The text in Bosanquet and Puller's report makes plain what should be the proportion to contribute in this case: there was, first of all, Jarvis liable as surety to the extent of \$3,000; Ostrander, husband and wife, liable for \$3,000; and the last surety, Everett Ostrander, liable for \$1,000; the total sum of all the common suretyship as one debt was \$7,000, and the sets of sureties should be liable in sevenths, according to the proportion of the amounts in which they engaged themselves—*i.e.*, for husband and wife, three-sevenths; for Jarvis, three-sevenths; and for Everett, one-seventh. The judgment should be to this extent modified, and make Jarvis liable for three-sevenths of the sum paid by Mr. Ostrander. The appeal with this change should be dismissed with costs. The neat point is worked out very clearly in *In re MacDonagh*, 10 Ir. Rep. Eq. 269.

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\* *Dering v. Lord Winchelsea* was decided in 1787, and was first reported from a MS. note by Bosanquet & Puller in 1814, and afterwards by Mr. Cox in 1816. The manner of its appearing in B. & P. would indicate that the source of information was Lord Eldon, who was counsel in the case: see 14 Ves., at p. 169. I would prefer the text in B. & P. rather than that in Cox.

## [DIVISIONAL COURT.]

WALKER V. THE WABASH R.W. CO.

D. C.

1909

*Railways—Collision—Negligence—Rules of Railway Company—Construction of Rules—Functions of Jury.*

Jan. 11.

In an action for damages for the death of an engine driver of the Grand Trunk Railway Co., whose train came into collision with a train of the defendant railway, it was contended by defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Questions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased:—

*Held*, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applicable to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened.

It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them on the explanatory evidence offered.

THIS was a motion by the defendants to set aside the judgment pronounced on April 18th, 1908, by Magee, J., after the trial of the action before him, with a jury, at St. Thomas, on the 17th and 18th of that month, in favour of the plaintiff, with damages, and for a nonsuit, and in the alternative to reduce the damages by the amount of a policy of accident insurance which was carried by the husband of the respondent.

The motion was argued on October 27th, 1908, before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

*H. E. Rose*, K.C., for the defendants, contended that the plaintiff should have been nonsuited on the ground of joint negligence by the deceased, who broke the rule by which he should have governed himself: *Harris v. London St. R.W.* (1907), 10 O.W.R. 302, 39 S.C.R. 398; and that, apart from any rule, the evidence shewed that the deceased was not acting reasonably. He also referred to the judgment of Meredith, J.A., in *Harris v. London St. R.W.*, reported only in vol. 304 Supreme Court Cases (Osgoode Hall Library), at p. 62; *Deyo v. Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588; *Holden v. G.T. R.W. Co.* (1903), 5 O.L.R. 301, 306; *G.T. R.W. Co. v. Birkett* (1904), 35 S.C.R. 296.

*J. B. Davidson*, for the plaintiff, contended that the defendants' signals shewed that the main line was clear, and that the

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plaintiff's train was a schedule train and bound to make up time; and that rule 218 had no application. He referred to *Scriver v. Lowe* (1900), 32 O.R. 290; *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149; *Great Western R.W. Co. v. Brown* (1879), 3 S.C.R. 159.

*Rose*, in reply.

January 11. MEREDITH, C.J.:—The respondent is the widow of John James Walker, who was killed on January 2nd, 1908, in a collision between his train and a train of the appellants, and she brings her action to recover compensation for his death, and it is brought for the benefit of herself and her deceased husband's father and mother.

The deceased was a locomotive engineer in the employment of the Grand Trunk R.W. Co., and at the time of his death was in charge of a locomotive which was pulling a regular schedule train of that company, which I shall afterwards refer to as Jackson's train, and proceeding westward from Fort Erie to St. Thomas. This train passed through the station grounds at Tillsonburg without stopping, and when it had reached a point on the line about one hundred yards east of a bridge crossing Otter Creek; about 3.20 a.m., came into collision with a train of the appellants, consisting of two engines and several cars, running from Corinth, the next station east of Tillsonburg, to the latter place.

This train had formed part of a train of the appellants which I shall hereafter refer to as Lawton's train, the remainder of which had been left, and at the time of the collision was lying on the north siding at Tillsonburg, having been separated from it in order that it might proceed to Corinth; and there was at the same time another train on the south siding.

The Lawton train was divided in obedience to instructions received by the conductor of it to double to Corinth, to which I shall afterwards refer, which meant that he was to divide his train, take part of it to Corinth, and then return to Tillsonburg and take the remainder to the same station.

The number of Jackson's train was 93. Lawton's train was not numbered, but is referred to in the train orders as extra west engines 1392 and 1125 coupled.



Lawton's train was under orders to run ahead of Jackson's, and of first No. 91 train; but, according to the testimony of Jackson, he was not made aware of the order. When Lawton's train arrived at Tillsonburg he was much behind time, and he there received a telegram from the despatcher at St. Thomas in these words: "What is the matter; you are making such slow time. Can you not handle train," to which the conductor replied: "On account of bad rail and train frozen up at Courtland will be unable to get over grade without doubling to Corinth. Please advise what to do." In reply to this the order to double to Corinth, to which I have referred, which reads: "Double to Corinth then and get out of there at once with half of your train," was received by Lawton at Tillsonburg. According to Jackson's testimony, he received a verbal order from the operator at Nixon Station to go ahead of train 91, which up to that time he had been following, and communicated this order to the deceased, and his train accordingly left Nixon ahead of train 91.

The Canadian Pacific Railway crosses the line of the Grand Trunk R.W. Co. about half a mile east of the station building at Tillsonburg, and there is at this crossing an interlocking switch. Before going over the crossing the deceased shut off steam and lessened the speed of his train, so that, according to Jackson's testimony, it passed over at a speed of from fifteen to twenty miles an hour; according to the same testimony, the deceased then increased the speed to about thirty-five miles an hour, at which rate the train was going when it passed through the station grounds, and when it had reached a point a short distance east of the cattle-pen shewn on the plan, he (Jackson) noticed that the part of Lawton's train which was lying in the north siding was not headed by an engine, and was about to apply the brakes, when the emergency brake on the engine was applied in an effort to stop the train, but without success, as the train, though its speed was lessened, went on a further distance of about seventeen hundred feet, when the collision occurred, its speed being then about twenty miles an hour.

According to Jackson's testimony, when his train had gone over the diamond at the crossing, everything in sight indicated that the track ahead was clear, and on the rear part of the por-

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tion of Lawton's train, which was in the north siding, were displayed green lights, which indicated that it was in clear of the main line.

Jackson also testified that when a train had to wait in the through siding at Tillsonburg, it was the practice to detach the engine, for the purpose of its being moved on to the water tank to take water, the object of this being to save the time which would be consumed if the taking of water was delayed until the train which was being met was passed. This evidence, which was brought out by the respondent's counsel, was intended to shew that it did not follow from seeing a train not headed by an engine on a siding that the engine was not on the siding ahead of its train, waiting to take water or taking water at the tank.

The appellants and the Grand Trunk R.W. Co. operate trains on the same line, which is a single track railway.

The contention of the respondents at the trial was that the collision was caused by the negligence of the conductor of Lawton's train in not sending out a flagman or seeing that proper lights were displayed on the rear of the part of that train, which was lying in the siding, to warn trains approaching from the east not to pass Tillsonburg; by the negligence of the brakeman in not so going out, and of the conductor in not asking for orders from the train despatcher at Corinth to return from Corinth to Tillsonburg.

The appellants' contention was that, according to the rules governing the deceased and the movements of his train, it was his duty to approach a station prepared to stop, and not to proceed until the switches and signals were seen to be right or the track was plainly seen to be clear; that it was also his duty not to proceed if a train, not headed by an engine, was upon the through siding at the station; that the deceased had disregarded this duty; that he had not approached the Tillsonburg station prepared to stop, but at such a speed as prevented him from bringing his train to a stop when he saw that the part of the train which had been left at Tillsonburg and was lying in the north siding was not headed by an engine, and that this failure of duty was the cause of the collision.

In support of the appellants' contention, reliance was placed

upon two rules of the Grand Trunk R.W. Co., both of which, it was argued, had been violated by the deceased.

One of these rules, No. 213, reads as follows:—

“213. All trains must approach stations, the end of double track, junctions, railroad crossing at grade, and drawbridges, prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear.

“Where required by law, all trains must stop.”

The other rule is No. 218, and reads as follows:—

“218. If a train parts while in motion, trainmen must use great care to prevent the detached parts from coming into collision. Enginemen must give the signal as provided in rule No. 165, and keep the front part of the train in motion until the detached portion is stopped.

“The front portion will have the right to go back, regardless of all trains, to recover the detached portion, first sending a flagman with danger signals a sufficient distance in advance in the direction in which the train is to be backed, and running with great caution, at a speed to insure absolute safety. On single track all the precautions required by the rules must also be taken to protect the train against opposing trains. The detached portion must not be moved or passed around until the front portion comes back. This rule applies to trains of every class.

“When it is known that the detached portion has been stopped, and the whole occurrence is in plain view, no curves or other obstructions intervening, so that signals can be seen from both portions of the train, the conductor and engineman may arrange for the re-coupling, using the greatest caution.”

The contention of the respondent was that the position of the order board at the station and of the semaphore at the west end of the sidings and the lights displayed on the rear end of the portion of Lawton's train which was in the north siding indicated that Lawton's train was in the siding clear of the main line, and that the main line was clear, and that the absence of a flagman to warn Jackson's train that the forward portion of Lawton's train was still on the main line was a further intimation to the deceased that the main line was clear.

The respondent's counsel also contended that it was Lawton's

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duty, when he reached Corinth, to communicate to the operator at that station the intended movements of his train, in which case it was contended that the operator at Tillsonburg would have been advised of them and would have displayed his order board, so as to warn the deceased to stop there.

The questions submitted to the jury and their answers, so far as they are material to our inquiry, are as follows:—

Question 1. Were the defendants guilty of any negligence which caused the death of John James Walker?

Answer. Yes.

Question 2. If so, wherein did such negligence consist?

Answer. By not displaying red markers at rear end of Lawton's train. By not sending out flagmen the required distance for safety. By conductor Lawton not asking for orders from despatcher to return from Corinth to Tillsonburg.

Question 3. What person or persons, if any, in the service of the defendants was or were guilty of such negligence, and what position did each occupy in the defendants' service?

Answer. The conductor and rear brakeman of Lawton's train.

Question 4. Could John James Walker by the exercise of reasonable care have avoided the injury which caused his death?

Answer. No.

A great mass of testimony was given at the trial, and witnesses were allowed, notwithstanding objection by counsel, to give their opinions as to the meaning of the two rules to which reference has been made, and as to the duty of the deceased and of Lawton in the circumstances of the case, and it is very difficult, if not impossible, to separate statements of the witnesses as to the practice followed in the operation of trains apart from the written rules, from what were merely expressions of opinion as to the meaning of the rules.

An instance of this is the opinion given by witnesses as to the meaning of rule 218, especially that part of it which refers to the detached portion of a train being "moved or passed around," which was said to mean that another train must not pass a train not headed by an engine lying in a siding; another instance is the opinion given as to the meaning of "approach stations" and "prepared to stop" as used in rule 213.

It was for the trial Judge to interpret and to instruct the jury

as to the meaning of the written rules, though, no doubt, parol evidence was admissible to explain, and it was for the jury to determine the meaning of technical terms used in them. The function of the jury was, however, at an end when the meaning of such terms had been determined, and it was for the trial Judge finally to decide what the meaning of the rules was.

As was said in *Neilson v. Harford* (1841), 8 M. & W. 806: "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances (if any) have been ascertained as facts by the jury, and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them" (page 823).

The case was submitted to the jury as one in which the questions were as to negligence of the appellants' servants and contributory negligence by the deceased. The proper questions, in addition to that of negligence of the appellants' servants, as it seems to us, were whether the deceased had disobeyed the rules of his employers, and whether but for that disobedience the accident would have happened, for, though the contention of the respondent as to negligence of the appellants' servants was well founded, if, notwithstanding that negligence, but for the deceased's disobedience of the rules the accident would not have happened, the respondent must fail.

For the protection of their property and of their employees and of persons and property being transported over their railway, the Grand Trunk R.W. Co. had provided double safeguards, one by the regulations affecting persons in the position which the deceased occupied, and the other, persons in the position which Lawton occupied, and the failure of Lawton to obey the regulations governing his conduct was, of course, no excuse for the deceased disobeying the regulations by which he was governed, and neither would be entitled to recover for an injury occasioned by his own negligence or by the combined negligence of both.

Much depends upon the meaning of rule 213. Its provisions

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are somewhat vague, for there is nothing in terms defining what is meant by "approach stations" or by "prepared to stop" or by "stations."

In construing the rule regard should, of course, be had to the object which it was designed to serve, so far as that can be gathered from the rule itself, and if it was the duty of the deceased not to have passed the portion of Lawton's train which was lying in the north siding, it may well be that the rule is to be interpreted as meaning that it was his duty, when approaching Tillsonburg, to have had his train under such control that if what did actually happen in this case occurred, he would be able to bring it to a stop before passing beyond the point where the sidings join the main line, and that notwithstanding that that line appeared to be clear and that the signals and other conditions indicated that it was clear.

If what has just been mentioned was the duty of the deceased under rule 213, he was guilty of a breach of that rule, and it may well be that but for that breach the accident would not have happened; but if that was not his duty, it may well be that, assuming the facts to be again found as to the appellants' negligence as they have been found, the deceased was guilty of no breach of duty in proceeding as he did through the station at Tillsonburg.

We do not think that rule 218 has any application. It deals with the case of a train parting while in motion, but not with the case of a train being designedly cut in two in order that such an operation as that in which those in charge of Lawton's train were engaged may be effected. The detached portion which is not to be moved or passed around is plainly the detached portion of a train which has parted while in motion.

If there be such a duty as it was contended rule 213 creates, it must depend not upon that rule, but upon some other written rule or the well-known practice adopted in the operation of the trains of the Grand Trunk R.W. Co.

Upon the whole, we think that the trial was not a satisfactory one, and that there must be a new trial in order that all questions of fact necessary for determining the rights of the parties may be found by the jury, after proper instructions as to the construction to be placed on the written rules, to use the



language of the Court in *Neilson v. Harford*, either "absolutely" or "conditionally."

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We say nothing as to the question of the right of the appellants to have deducted from the damages assessed the amount of the accident insurance which the deceased carried, and which it is said was received by his widow.

The facts as to this insurance were not brought out fully at the trial, and we think it better not to express an opinion as to that question now on a hypothetical state of facts, or on the facts as stated in the affidavits filed by the appellants in support of their motion, especially as no additional expense and no inconvenience will be occasioned by taking that course, the deduction being a mere matter of calculation, if the appellants are right as to the law and the facts on this branch of the case.

The appeal will therefore be allowed and a new trial had, and the costs of the former trial and of the appeal will be costs in the cause, unless the Judge before whom the action is retried otherwise directs.

A. H. F. L.

## [DIVISIONAL COURT.]

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Sept. 22.

Dec. 29

MORGAN V. MCFEE.

*Contract — Indemnity — Consideration Therefor — “False Pretences” — Withdrawal of Criminal Charge—Validity—Action on.*

A charge laid before a magistrate against a person for procuring from the plaintiff, by false pretences, the sum of \$10, was, by direction of the magistrate, withdrawn, in consideration of an agreement entered into between the plaintiff and the defendants, whereby the plaintiff was to withdraw from a certain syndicate and forfeit the \$10 paid, the defendants indemnifying him against all liabilities of the syndicate. Judgment having been recovered against the plaintiff for a liability of the syndicate, he brought an action against the defendants for indemnity:—

*Held*, that the agreement for the withdrawal of the criminal charge was void, and could not be enforced, and that the plaintiff's action was not maintainable.

*Keir v. Leeman* (1844), 6 Q.B. 308, (1846) 9 Q.B. 371, specially considered.

THIS was an action brought by the plaintiff, claiming by virtue of an undertaking therefor by the defendants, to be indemnified against a claim made against him.

The statement of claim alleged that one Oliver was engaged in organizing a syndicate with the intention of ultimately forming a company to acquire certain patents of invention; that Oliver and the defendant Gates induced the plaintiff to sign an agreement to pay \$50 for a share in this syndicate and to pay \$10 on account thereof; that the plaintiff laid an information before the police magistrate of Sarnia, charging Oliver with obtaining from the plaintiff the said sum of \$10 by false pretences and with intent to defraud; that the case came on for hearing before the police magistrate, and, pending the giving of evidence, Oliver asked for an adjournment, which was granted by the police magistrate; that during the adjournment the plaintiff and the defendants entered into an agreement that the plaintiff should drop out of the syndicate and forfeit the \$10 he had paid, and the defendants would, in consideration thereof, indemnify the plaintiff against all the liabilities of the syndicate; that the county Crown attorney, at the conclusion of the adjournment, stated to the police magistrate that the parties had agreed as above, and thereupon the proceedings before the police magistrate were, by the direction of the police magistrate, dropped; that one Richardson commenced an action against “the above-named

defendant" in respect of a liability of the syndicate, and the defendants procured the plaintiff in this action to be added as a defendant in that. And claims a declaration that he has ceased to be a member of the syndicate, and that the defendants are bound to indemnify him against the liabilities of the syndicate.

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The action was tried before MACMAHON, J., at Sarnia, on September 22nd, 1908.

*D. S. McMillan*, for the plaintiff.

*A. S. Burnham*, for the defendants.

The facts, so far as material, are stated in the judgments.

At the conclusion of the evidence, the learned Judge delivered the following judgment:—

MACMAHON, J.:—I think that the action fails and must be dismissed. A charge was laid by the plaintiff Morgan against Frederick William Oliver, for obtaining the sum of \$10 from him by false pretences, which was investigated by the police magistrate, and, after some evidence had been given as to the offence, it was agreed that the charge should be withdrawn, on the condition that the defendants would pay the liabilities of a certain syndicate, which had been formed with the intention of ultimately forming a company to be known as the Oliver Motor Company.

That was compounding a felony. It is, of course, against public policy, in all cases where a charge is made involving the public interest, that the prosecution should be dropped by the parties entering into such an agreement, and any contract founded upon such agreement is an absolute nullity.

I therefore find that the action fails, and must be dismissed.

From this judgment the plaintiff appealed to the Divisional Court.

On November 30, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*W. N. Tilley*, for the plaintiff. What the law prohibits is the compounding of a felony. The learned trial Judge proceeded on the assumption that the offence of which Oliver was charged before the magistrate constituted a felony, whereas it was merely a misdemeanour: *Russell on Crimes*, 6th ed., vol. 2, p. 1468. Where

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also an action can be maintained to recover back the money obtained, the charge can be settled and withdrawn: *Keir v. Leeman* (1844), 6 Q.B. 308, 321, affirmed on appeal (1846), 9 Q.B. 371; *Wardhill Local Board of Health v. Vint* (1890), 45 Ch.D. 351; *Fisher & Co. v. Appolinaris Co.* (1875), L.R. 10 Ch. App. 297; *Williams v. Bayley* (1866), L.R. 1 H.L. 200; Tremear's Crim. Code, 2nd ed., 119, where the cases are collected. Then there is the fact that Oliver was not on trial when the charge was withdrawn; and it was withdrawn with the consent of the magistrate and the county attorney.

*A. Weir*, for the defendant Telford. There is no distinction between a felony and a misdemeanour of this kind. Both are on the same footing under the Criminal Code. The object of putting the criminal law in motion is for the protection of the public, and an agreement of this nature which has the effect of stifling the prosecution is against public policy and void, and therefore cannot be enforced: *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173. In the cases referred to by the other side the offences were rather against the individual than the public.

*J. H. Spence*, for the other defendants, relied on the same grounds of argument.

December 29. FALCONBRIDGE, C.J.:—The learned trial Judge was clearly right in dismissing the action, and the appeal must be dismissed with costs.

BRITTON, J.:—The following was clearly established by the plaintiff himself.

(1) That the plaintiff instituted criminal proceedings before the police magistrate for the town of Sarnia against one Frederick Wm. Oliver for obtaining by false pretences ten dollars from the plaintiff, with intent to defraud.

(2) That on the hearing of that charge, and before its conclusion, the alleged agreement set out in the statement of claim was entered into with the defendants.

(3) That part of the consideration for the agreement mentioned was the dropping or the withdrawal of the charge of false pretences against Oliver; and

(4) The charge against Oliver was dropped—it was not then, and never since then has been, proceeded with.



Upon these facts the contract or agreement, which is the foundation of the present action, would seem to be a violation of the rule long ago stated in 1 Chitty's Crim. Law., 4. In general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, is invalid. To render the agreement void it is not necessary that there should be committed the criminal offence of "compounding a felony."

False pretences, before the enactment of the Criminal Code, was only a misdemeanour. By the Code it is made an offence liable to imprisonment for three years. It is a serious offence against the public, and although a person who has parted with his money or property by means of a false pretence to him or other fraud practised upon him, or by reason of theft, is entitled to take his own property if offered to him, he is not permitted to screen the offender by an agreement not to prosecute or to drop a prosecution already entered upon.

The very least that can be said is that such an agreement is void.

It was argued that Oliver was not on trial on the criminal charge. That makes no difference.

It is sufficient to void the agreement, if only an implied term of it, that there should be no prosecution. That is an illegal consideration, and the agreement formed on it is void. See *Jones v. Merionethshire*, [1892] 1 Ch. 173. By a reference further to that case, it will be seen that effect must be given, on grounds of public policy, to such a defence when raising it, which under particular circumstances, might be called disreputable.

Lord Denman, C.J., said, in the case of *Keir v. Leeman*, 6 Q.B. 308, at p. 321 (cited by Mr. Tilley): "We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action." Then follows: "But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." And in that case the learned Chief Justice held that riot and obstructing a police officer in the execution of his duty were matters of public con-

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cern, and therefore not legally the subject of a compromise." See also *Williams v. Bayley*, L.R. 1 H.L. 200.

|| The case of *Fisher & Co. v. Apollinaris Co.*, L.R. 10 Ch. App. 297, was also cited for the plaintiff. This was a trade mark case, and was treated as something purely personal between the parties, under the Trade Marks Act. Prior to 25-26 Vict. ch. 88 (Imp.) the sole remedy was by action or suit in equity, but under the Act the wrong became also the subject of a criminal prosecution. The Court held that it was quite proper to withdraw from a charge of that kind, but the Court said it would, of course, be different if there was any case alleged of extorting money under threats. The distinction may be fine in some cases between prosecutions which may be abandoned under an agreement and those where any agreement to abandon would be illegal; but it must, I think, be conceded that a charge of obtaining money under false pretences is so like theft as to be a matter in which the public interest is to be considered.

I am of opinion that the judgment dismissing the action ought not to be disturbed.

Appeal dismissed with costs.

RIDDELL, J. (The learned Judge, after setting out the statement of claim, proceeded):—At the trial before my brother MacMahon, the plaintiff gave this account of what took place before, at and after the adjournment.

"Q. Now, as that trial proceeded, was there any settlement of the matters as between anybody and yourself? A. Yes, sir; the case was adjourned for a few minutes, so that we might talk the matter over.

"Q. Who was there? A. The secretary and treasurer—that is Mr. Gates and Mr. Giffin.

"Q. Was there anybody else? A. That is all I remember just now, but I will swear those were there, and there were others there that I don't remember.

"Q. Now, what was done between you and these defendants who were there? A. The police magistrate adjourned the case so that we might consult. There was Mr. Gates and Mr. Giffin and myself, and we retired to the chief of police's room and discussed the matter there.

"Q. Who else was there? A. Mr. Buck, the county Crown attorney, and Mr. Price.

"Q. What took place? A. They wanted to know what I would take and to be released.

"Q. What was done then? A. They wanted to know what I would do and release the defendant Oliver altogether; drop the case; withdraw the charge against him. I wanted that they should pay me back the \$20 of stock that I had paid in, and that I would release or withdraw the charge, and they give me a release. They demurred at that. I wanted them to give me a release from all liability in the company. At last they gave me an offer that if I would step out of the company as I stood they would give me a clear release, and they would have no claim on me for anything at all; that they would release me from all obligation in the matter, and Mr. Price was to draw up a release, and I was to call in the next day, or whenever it was convenient, and he would hand it to me. I called in several times for the release, but failed to get it.

"His Lordship: Did the police court proceedings stop? A. Yes, sir; they were withdrawn."

The learned trial Judge, at the close of the plaintiff's case, held that the agreement was that the charge should be withdrawn on condition that the defendants should pay the liabilities of the syndicate, and proceeds:

"That was compounding a felony. It is, of course, against public policy, in all cases where a charge is made involving the public interest, that the prosecution should be dropped by the parties entering into such an agreement, and any contract founded on such an agreement is an absolute nullity.

"I therefore find that the action fails and must be dismissed."

The plaintiff now appeals.

With the learned Judge's finding of fact the plaintiff at least cannot quarrel, and, in the view I take of the case, I do not think the error—if there be an error—in finding that the defendants agreed without distinguishing the defendants present at the conference from those who were absent, need be considered.

But the plaintiff says the decision is wrong, as the offence charged was not a felony, and, being at worst a misdemeanour, it could be compromised or "dropped" as it was.

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The statement by the learned trial judge that this was compounding a felony, is, of course, the merest inadvertence. Obtaining money by false pretences never was a felony in our law or in the law of England from which our law is taken: R.S.C. 1886, ch. 164, sec. 77; 2 Russell on Crimes, 6th ed., p. 524; and the like common law offences were also misdemeanours, not felonies: 2 Russell, book iv., ch. 32, pp. 511 *et seq.*

But the leading case of *Keir v. Leeman*, 6 Q.B. 308, 9 Q.B. 371, does not draw a line of demarcation between cases of felony and cases of misdemeanour, and say that the latter may be compromised. The Court says, 9 Q.B., at pp. 392, 393: "It seems clear from the various authorities brought before us in the argument that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them and to consent to give no evidence against the parties accused, is founded on an illegal consideration."

In *Whitmore v. Farley* (1881), 14 Cox C.C. 617, James, L.J., at p. 621, says: "Whether it was a felony or misdemeanour does not matter so far as this case is concerned."

Baggallay, L.J., at p. 622: "I am clear that, upon the authorities, it is immaterial whether the charge attempted to be compromised was a felony or only a misdemeanour. Any agreement to compound a criminal prosecution for" such "a public offence" [a bailee had disposed of certain securities entrusted to him] "is illegal, and it is wholly immaterial that such agreement has received the sanction in Court of the magistrate before whom the charge was brought. The sanction of the magistrate cannot render valid a transaction which would otherwise be illegal."

Lush, L.J., says (p. 623): "It is a well-established doctrine that an agreement to forego public rights is an illegal agreement. Whether the felony could have been proved here or not, there is no doubt that a criminal charge was laid, and the prosecutrix could not legally withdraw it. The fact that the presiding magistrate consented to the withdrawal of the charge does not make it legal."

Unless the obtaining of money by false pretences is less a public matter—one in which the public is concerned—than that of making away with securities entrusted to one's care, this appeal must fail; and, as I think, to ask the question is to answer it.

But express authority is not wanting. In the well-known case of *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, at p. 184, Bowen, L.J., says: "It is not possible to deny that embezzlement, like false pretences, is a crime committed against the public as well as against the individual, and, in deciding what steps should be taken to punish it, the person who has to deal with the case must, if he is to discharge his moral duty, conscientiously consider the public as well as himself."

These golden words should be borne in mind as well by magistrates and Crown attorneys as by private prosecutors who claim that they have been defrauded. There can be doubt that the Lord Justice is right in the statement that the obtaining of money by false pretences is a crime committed against the public; that being so, there was no power to compromise; the agreement (if any) on the part of the defendants was based upon a consideration in part illegal. The agreement, then, is against public policy.

The appeal should be dismissed with costs.

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## [DIVISIONAL COURT.]

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BASSETT V. CLARKE STANDARD MINING AND DEVELOPING  
COMPANY, LIMITED.

July 23.  
Dec. 30.

*Mines and Minerals—Surface Rights—Compensation for—Liability Limited to Licensee—Jurisdiction of Mining Commissioner—Inability of Parties to Agree—Necessity for—Jurisdiction of High Court—6 Edw. VII. ch. 11, sec. 119 (O.); 7 Edw. VII. ch. 13, sec. 33 (O.).*

The compensation payable, under sec. 119 of the Mines Act of 1906, 6 Edw. VII. ch. 11 (O.), as amended by sec. 33 of the Mines Act of 1907, 7 Edw. VII. ch. 13 (O.), for damage done to surface rights in lands in the working of a mining claim, is claimable only against the licensee who staked out the claim, and not against his transferee.  
Judgment of Teetzel, J., affirmed.

THIS was an appeal from the judgment of TEETZEL, J., at the trial at North Bay on June 24th, 1908.

The action was brought upon an award or judgment of the mining commissioner, fixing the damages to be paid by defendants to the plaintiff under sec. 119 of the Mines Act of 1906, 6 Edw. VII. ch. 11 (O.), as amended by sec. 33 of the Mines Act of 1907, 7 Edw. VII. ch. 13 (O.).

*R. McKay*, for the plaintiff.

*H. D. Gamble*, K.C., for the defendants.

At the conclusion of the evidence the learned Judge reserved his decision, and subsequently delivered the following judgment:—

July 23. TEETZEL, J.:—Several objections were taken to the award, but, I think, all, except two, which I will discuss, are not now open to the defendant, who did not appeal under sec. 30.

Two objections to the jurisdiction of the commissioner are, I think, fatal. They both involve an interpretation of sec. 119 of the Mines Act of 1906, as amended, and sec. 33 of 7 Edw. VII. ch. 13, which repeals and enacts a substituted section for sec. 132 of the Mines Act, 1906.

Sub-section 1 of sec. 119, as amended, reads: "When the surface rights in any lands have been granted, sold, leased or



located, and a mining claim shall be staked out for any portion of the said lands, the licensee so staking out shall compensate the owners, the lessee or locatee of said surface rights for injury or damages which are or may be caused to the surface rights, and, in case the licensee and such owner, lessee or locatee are unable to agree upon the amount of the compensation therefor, or the manner in which same shall be paid or secured, application by any party interested may be made to the mining commissioner to ascertain, determine and prescribe the amount of such compensation, and the manner and time in which the same shall be paid or secured, and the same shall thereupon be ascertained, determined and prescribed by the mining commissioner, or as he may direct, and, when so ascertained, determined or prescribed, shall, and every order made under this section shall, be final and binding upon all parties interested."

Section 132, as amended by sec. 35 of 7 Edw. VII. ch. 13, reads: "A licensee who discovers valuable mineral in place on any lands open to prospecting, as specified in sec. 131 of this Act, or a licensee upon whose behalf valuable mineral in place is discovered by another licensee upon any such lands, shall have the right to stake out or have staked out for him a mining claim thereon; and, subject as in this Act provided, he shall have the right to work the same, or to transfer his interest, or inchoate or potential interest therein to another licensee; but, in case the surface rights have been granted, leased or located by the Crown, the licensee must proceed as in sec. 119 of this Act provided."

The plaintiff is the owner of the surface rights in the land in question. The defendants are not the original licensees, who staked out the mining claim upon the plaintiff's land.

Adam J. Clark was the licensee who discovered the claim on 24th May, 1905, which, so far as the evidence shews, was not for the defendants, but on his own behalf.

The claim was transferred to the defendants by Clark on 14th December, 1906.

It was admitted that the plaintiff never asked or demanded compensation for surface rights from Clarke, and never entered into negotiations in reference thereto, in any way, with Clarke, and the evidence does not shew that other than by taking out

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and serving the appointment before the commissioner to fix the damages was any demand made by the plaintiff upon the defendant for damages, or that any negotiations took place with the view of fixing the damages.

The only evidence of any effect to agree upon damages appears on the plaintiff's evidence before the commissioner. He was asked: "Q. What do you value your whole farm at? A. Well, I told the Clarke Standard people, in the month of February, before they did much digging, that they could have it for \$1,000." His whole farm consisted of 160 acres, and the land in question is 40 acres of it.

But, assuming that what was done amounted to a demand upon the defendants for compensation, the first objection urged to the plaintiff's right to maintain the award is that, under the Act, it is only to the licensee who stakes out the claims that the special provisions of sec. 119 apply, so that if the plaintiff failed to agree with him or to get an award against him, his remedy against the defendant for any damages committed by them would be by action—not the summary proceeding under sec. 119.

Reading secs. 119 and 132 together, I am of opinion that the "licensee" whose rights and obligations are defined is the licensee who stakes out the claim, and not his transferee.

It may be that the legislation intended to include a transferee of the licensee who staked out the claim, but, in my opinion, the language used is not sufficient to express that intention.

The second objection is that, before the matter could be brought before the commissioner, the parties must have made an effort to agree upon the amount of compensation, and that it is a condition precedent to the right of the commissioner to proceed under sec. 119 that the parties, after treaty, have failed to agree upon the amount or the manner in which the same shall be paid or secured.

The Act clearly contemplates an effort being made by the parties to agree, and it is only in the event of the parties not agreeing that either party may apply to the commissioner, who shall "thereupon" ascertain, etc.

I think in this action the burden was upon the plaintiff to establish that the parties were unable to agree after a *bonâ fide* attempt to do so had been made. This objection would defeat

the plaintiff, even assuming the Act applies to a transferee of the original licensee, for the evidence does not satisfy me that any treaty was held as the result of which the parties were "unable to agree upon the amount of compensation," or the manner in which it should be paid or secured, and, consequently, there is no foundation for the jurisdiction of the commissioner to adjudicate upon the matter. See *Saunby v. Water Commissioners of the City of London*, [1906] A.C. 110, at p. 115; also *Tully v. Chamberlain* (1871), 31 U.C.R. 299.

The action must be dismissed, but, under the circumstances, it will be without costs.

From this judgment the plaintiff appealed to the Divisional Court.

On November 30, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*R. McKay*, for the appellant. The learned trial Judge based his decision on two grounds: (1) that the original licensee was the only person liable to make compensation; and (2) that there must have been some negotiations with the view of fixing the amount of such compensation and a disagreement before the jurisdiction of the mining commissioner could be invoked. As to the first ground, this depends upon the construction to be placed on sec. 119 of the Mines Act of 1906, 6 Edw. VII. ch. 11 (O.), read in connection with sec. 132, as amended by sec. 35 of the Mines Act of 1907, 7 Edw. VII. ch. 13 (O.). Under these sections the claim of the owner of the surface rights is not restricted to the original licensee, but he can make a claim against the transferee of such licensee, such transferee taking the claim subject to all its burdens. The word "licensee" in the latter part of the amended sec. 132, read in connection with the rest of the section, bears out this contention. As to the second ground, the defendants cannot now say there was not a failure to agree upon the compensation. There was the notice to have the compensation fixed, the refusal to do anything, and the contest before the mining commissioner.

*H. D. Gamble*, K.C., for the respondent. No action is maintainable by the plaintiff in the High Court. The plaintiff's rights and remedies are governed by the Mines Act. The whole policy of the

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Act is to give the mining commissioner exclusive jurisdiction in all matters which may come or be brought before him under the provisions of the Act. Under the Act the commissioner has all the powers and jurisdiction of a Court to carry out the provisions of the Act. He has authority to make orders, direct payment, and he can enforce his orders by injunction or mandamus. Then it is provided that for a wilful contravention of, or a refusal to obey his orders, the party may be summarily convicted and fined or imprisoned. Then the order may be filed in the office of the district court and execution issued for the amount directed to be paid. A lien also is given on the mine for the amount of the order or award. Even though the remedies given by the Act may be deemed unsatisfactory, this will not give the High Court jurisdiction. He referred to secs. 8, 9, 16, 17 and 24 of the Mines Act of 1907; *Berkeley v. Elderkin* (1853), 1 E. & B. 805, 807; *Regina v. County Court Judge of Essex* (1887), 18 Q.B.D. 704; *Vestry of St. Pancras v. Batterbury* (1857), 2 C.B.N.S. 477, 486; *Hardcastle on Statutes*, 3rd ed., p. 333; *Maxwell on Statutes*, 4th ed., 196, 606-7; *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387; *West v. Dowman* (1880), 14 Ch.D. 111, 120; *Aldrich v. Aldrich* (1893), 23 O.R. 734, 24 O.R. 124; *Bassett v. Clark Standard Mines and Developing Co., Ltd.* (1907), 10 O.W.R. 752. The grounds relied on by the learned trial Judge are, however, a complete answer to the action. The original licensee is the only person liable. This clearly appears from sec. 119 of the Act of 1906, sec. 132, as amended by sec. 35 of the Act of 1907, in no way extending it to the assignee. There must also be some negotiations for a settlement of the claim, and a disagreement, before the jurisdiction of the mining commissioner can be invoked. There was nothing of the kind here. The fact of the giving of the notice and the contest before the mining commissioner cannot have the effect of doing away with what the Act deems essential, namely, a disagreement before applying to the mining commissioner. The order also should have been filed in the office of the district court before any attempt can be made to enforce it.

*R. McKay*, in reply. The High Court has jurisdiction to entertain the matter. Sec. 34 contemplates the decision of the mining commissioner being in the form of an award, and not in the form of a judgment, and it contains no direction for judgment to



be entered upon it. It can therefore be enforced the same as any award can be enforced. No adequate remedy is given under the Act to enforce the order; and where an obligation is imposed and no adequate remedy given for its enforcement, the Court has jurisdiction to interfere for this purpose: *Hutchinson v. Gillespie* (1856), 11 Ex. 798; *Bennett v. Neale* (1811), 14 East 343; *Adams v. Ready* (1861), 6 H. & N. 261.

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December 30. FALCONBRIDGE, C. J.:—I am of the opinion (although not entirely without doubt) that my brother Teetzel's judgment is right, and ought to be affirmed.

The appeal will be dismissed with costs. The plaintiff to have leave to appeal if so advised.

BRITTON, J.:—The action is upon an award of the mining commissioner, and was tried at North Bay.

Judgment was given, after the trial, dismissing the action.

The facts, which are undisputed, are as follows:—

The plaintiff is the owner of the surface rights of the N.W.  $\frac{1}{4}$  of N.  $\frac{1}{2}$  of lot 3, 6 con. of the township of Bucke.

One A. J. Clarke staked out a mining claim thereon, on the 24th May, 1905.

So far as appears, he did no mining on the location other than what was necessary to such discovery, and so did no damage to the plaintiff of which the plaintiff complained.

A. J. Clarke transferred his rights to the defendants on the 14th December, 1906.

The defendants took possession of this mining claim, sent a surveyor on, proceeded to sink a shaft, cut timber, and do work necessary for mining. The plaintiff told those employed by the defendants that they would have to pay for the timber. The plaintiff claimed damages from the defendants, offered to the defendants the whole property for \$1,000, and the defendants would not give it—said it was too much. The plaintiff made no demand upon A. J. Clarke, the original staker, but he did upon the defendants, and on the 9th May, 1907, obtained an appointment from the mining commissioner, against the defendants, to fix the compensation which should be allowed to the plaintiff for



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damages and injuries to the surface rights by the exercise of the mining rights under this mining claim.

The matter came on for hearing on the 27th of May, 1907, and the defendants appeared by attorney. Considerable evidence was given on behalf of the plaintiff by witnesses, who were cross-examined at great length by the attorney for the defendants. An adjournment was had on 27th May until the 29th, at 2 p.m., when, no one further appearing for the defendants, the matter was closed, and on the 30th May the commissioner made his award.

The defendants refused to pay, and on the 15th July this action was commenced.

The plaintiff's right to recover compensation for damage to his surface rights depends upon sec. 119 of the Mines Act, 1906, which provides that where (as in this case) "the surface rights in any lands have been granted, sold, leased or located, and a mining claim shall be staked out for any portion of the said lands, the licensee so staking out shall compensate the owner . . . of the said surface rights for injury or damages which are or may be caused to the surface rights."

The amount of compensation, if the parties do not agree, is to be determined by the mining commissioner. He does this upon the application of any person interested. The determination is once for all, because the compensation is "for injury or damages which are or may be caused to the surface rights."

There is the personal liability placed by this section upon the licensee "so staking out," but, as the defendants are not the persons staking, there is no personal liability for which they can be sued unless that liability is created by sec. 132.

It certainly is not easy to understand just what the legislature meant by sec. 132. It deals with licensees:

- (1) A licensee who discovers for himself has a right to stake.
- (2) A licensee for whom another licensee has discovered has the right to stake or have staked for him.
- (3) Each has a right to work his claim.
- (4) Each has a right to transfer his interest or inchoate or potential interest in his claim to another licensee.

But, in any case where the surface rights have been granted, the licensee, whether the one who discovers and stakes or the

one for whom a discovery has been made and who stakes or who has it staked for him, must proceed as in sec. 119—that is to say, he must recognize a liability to compensate for damages to surface rights, and may proceed or be proceeded against before the mining commissioner to have the amount determined.

I quite admit the force of the argument that the “licensee” last mentioned in sec. 132 must mean “another licensee,” as mentioned in the ninth line of that section—that is to say, “assignee-licensee” or “transferee-licensee.”

It may be that sec. 132 was intended to make the transferee personally liable where surface rights had not been adjusted, but, if so, it is not so worded as to carry out the intention. It may well be asked, if that was not intended, why were the words beginning with the word “but” in the ninth line of sec. 132 to the end of that section, inserted? If that was not intended, sec. 119 covers the whole case. Section 119 says: “The licensee so staking out,” and that must mean personally staking, or the person for whom some other licensee has staked. The argument is certainly strong. I have, however, but not without doubt and difficulty, come to the conclusion that sec. 132 does not extend sec. 119 so as to create a personal liability against transferees as to surface rights. Section 132 was intended to make clear the right of a licensee to have a claim staked out for him, and that any licensee should have the right to transfer to another licensee, but the doing of this does not prevent a licensee, staking out, from being liable for compensation, as stated in sec. 119.

If that is the proper conclusion, the plaintiff fails, as he has no right of action against the defendants, but there should be no difficulty in the plaintiff getting redress under sec. 119, sub-sec. 3, as now amended. If the defendants do not consent to the present award, I suppose another award can be made, with the person staking out before the Court; and, as was contended on the argument by counsel for the defendants, the mining commissioner can “make such order by way of injunction or otherwise, as he may deem just, for the enforcement of payment . . . of the amount awarded.”

I do not suggest that the present award cannot be enforced. If there existed personal liability on part of the defendants, there was, in my opinion, such a disagreement between them and the

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plaintiff as to give the mining commissioner jurisdiction. The defendants, having appeared by counsel before the mining commissioner, could not be heard now to say that there was no disagreement as to amount.

I would dismiss the appeal without costs.

RIDDELL, J.:—The plaintiff is the owner of the surface rights in certain lands in the township of Bucke.

On the 4th May, 1905, one Adam J. Clarke is said to have discovered valuable mineral upon the said lands, and on the 24th May, 1905, he staked out a claim thereon. No negotiations took place between Clarke and the plaintiff in respect of compensation under sec. 119 of that Act, nor was there at any time any demand or request made by him for compensation.

He sold to the defendants, or, at least, the defendants, not being the licensees who staked out the claim, have acquired the rights of Clarke by transfer of the 14th December, 1906. On the 9th May, 1907, the mining commissioner, acting under sec. 119 of the Act, gave an appointment for the purpose of fixing and determining the amount of compensation and the time and manner in which it should be paid or secured, and gave a direction that it should be served upon the defendant company by delivering a copy to their solicitor or secretary.

Upon the return of the appointment, counsel appeared for the company, consented to the plaintiff putting in his evidence, and said that two witnesses whom he had expected had not turned up, but that the defendants could put in evidence afterwards if reasonable time were given. The matter was proceeded with, the plaintiff's witnesses examined and cross-examined by the defendants' counsel, and it was then arranged, as the defendants' witnesses had not turned up, that the matter should be adjourned for two days. At the adjourned appointment the plaintiff appeared, but no one attended for the defendants, and the commissioner thereupon made his decision: "I have ascertained and determined and I hereby fix and award the compensation which shall be paid by the said the Clarke Standard Mining and Developing Company, Limited, under sec. 119 of the Mines Act, 1906, for injury and damages which are or may be caused to the surface rights of all and singular (setting out the property), at the sum

of \$705, which sum I direct to be paid as follows, namely, \$305 within 15 days from the date hereof, and the balance before the issue of a patent for the said mining claim.—Dated this 30th day of May, 1907.”

The patent, we are informed, has not yet issued.

The money not being paid, the plaintiff issued a writ for \$305 and interest.

A motion for summary judgment was refused by the Master in Chambers: (1907), 10 O.W.R. 752, and at the trial my brother Teetzel dismissed the action without costs.

The plaintiff now appeals.

The first point to be determined is whether there is any personal liability upon the defendants to pay at all. Mr. Justice Teetzel considered that the statute laid the obligation to pay upon the licensee who staked out the claim, and upon no transferee from him. A perusal and consideration of the statutes have led me to the conclusion that my learned brother is right in this interpretation.

Section 119 it is, which imposes the obligation to pay, and that section alone. That section is explicit: “The licensee so staking out shall compensate the owner,” etc. At the time of staking out a claim, the licensee so staking becomes liable to pay to the owner of surface rights compensation to be arrived at in one way or another. This is a personal obligation, and, unless the obligation is removed in some way by statute or otherwise, it must continue until discharged. I do not think sec. 132, either in the form in which it existed at the time the defendants acquired their rights or as amended, has any effect upon the original obligation or in attaching to the transferee an obligation under sec. 119. There is, as I read the Act, no transfer of the obligation now under consideration to the transferee of the rights of the original staking licensee. The closing words of sec. 132 do not refer to the licensee called “another licensee,” but to him who is called a “licensee.”

Of course, this leads to the conclusion that it would be open for a wealthy licensee to take over discoveries made and staked by an impecunious person in his own name, and by taking a transfer in this way, be in a better position than if he had been the original discoverer and staking licensee. But, on the other hand, this would prevent a wealthy staking licensee, after doing

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great damage to the owner of the surface rights, and having, perhaps, exhausted the mineral, from getting rid of his liability to pay the surface owner by a transfer to a man of straw. I do not find in the Acts anything to indicate that the mere transfer of the rights of the staking licensee operates as a transfer also of the liabilities. And the plaintiff is not in any way assisted by the provisions of sub-sec. (3) of sec. 119, introduced by 7 Edw. VII. ch. 13, sec. 33, which simply gives a lien for the compensation awarded upon any mining rights at the time of the injury done or begun, and any rights subsequently acquired by the person against whom the award is made. Before this Act there was no lien; after, a lien only on the rights of him who was liable. I do not consider whether this Act applies at all. The whole effect is to give a lien, not to affix a personal liability; and a lien does not transfer a personal liability: *Quart v. Eager* (1908), 12 O.W.R. 735.

Nor is any assistance to be derived from a suggestion that there may be a statutory liability upon one licensee for a part and upon another, his transferee, for another part. Mr. McKay repudiated this proposition, and I think he was right. It would seem that there must be a determination of this compensation once for all: *Power v. Griffin* (1902), 33 S.C.R. 39; and in any event there is the express wording of the statute, impossible to get over.

I am unable to agree with the argument against the jurisdiction of the Court, and had the defendants otherwise been liable, I do not think that, in the facts of this case, the commissioner had not jurisdiction.

But the appeal must be dismissed upon the one ground, and with costs.

The case involves a question of the utmost importance to a large class of property owners, and this question should, I think, be decided by the highest provincial Court. The plaintiff should have leave to appeal, if so advised, under 4 Edw. VII. ch. 11, sec. 2.

G. F. H.



[MEREDITH, C.J. C.P.]

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*Company*—"Prospectus"—*Advertisement*—*Ontario Companies Act*, secs. 95, 99, 100—*Director*—*Penalty*.

A mining company incorporated on the 17th November, 1908, pursuant to the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34, filed a prospectus with the Provincial Secretary on the 27th November, 1908, and subsequently inserted in certain newspapers an advertisement, for which the defendant, one of the directors, was responsible, giving particulars about the organisation of the company, the mining lands owned by the company, and the operations of the company, and stating that shares were for sale at a named price, but not complying in all respects with the requirements of the Act as regards a prospectus, and not filed with the Provincial Secretary:—

*Held*, that the advertisement was a "prospectus" within the meaning of sec. 99 of the Act, being an advertisement designed to accomplish the purpose mentioned in sec. 95 (1), and that the defendant was liable to the penalty imposed by sec. 100.

*Semble*, that an advertisement merely stating that a company are offering shares for sale, and that a prospectus can be obtained upon application, would be a "prospectus" within the meaning of the Act.

CASE stated by Rupert E. Kingsford, one of the police magistrates in and for the city of Toronto, pursuant to R.S.O. 1897, ch. 90, and the Criminal Code of Canada, as follows (omitting formal parts):—

1. On the 11th December, 1908, an information was laid before me by Henry Reburn against the defendant, J. W. Garvin, in the words and figures following:—

"Information and complaint of Henry Reburn, of the city of Toronto, in the county of York, detective, taken on oath before me, Rupert E. Kingsford, police magistrate for the city of Toronto, on the 11th December, 1908.

"The said informant upon oath saith he is informed and believes that J. W. Garvin, president of the Titan Montreal River Mines Limited, during the month of November and from the 1st until the 10th December, 1908, in the city of Toronto, in the county of York, did knowingly publish and issue a prospectus by and on behalf of the Titan Montreal River Mines Limited, or in relation to the said company or intended company, or as a person who is or has been engaged or interested in the formation or promotion of the company, or who is responsible for the said prospectus, contrary to part VII. of ch. 34 of the statutes of Ontario, 7 Edw. VII., being

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an Act respecting Joint Stock and other Companies, and amending Acts, which said prospectuses omitted to disclose the particulars as follows, required by law to be contained in said prospectus:—

“1. The said prospectus bears no date.

“2. The said prospectus was not signed by the directors, or persons named therein as directors or provisional directors, and was not filed with the Provincial Secretary.

“3. The said prospectus was issued before being filed.

“4. The said prospectus did not contain the names, descriptions, and addresses of the original incorporators and the number of shares subscribed for by them respectively.

“5. The said prospectus did not contain the number of shares (if any) fixed as the qualification of the directors, and any provision in the by-laws of the company as to the remuneration of the directors.

“6. The said prospectus did not contain the names, descriptions, and addresses of the directors or proposed directors.

“7. The said prospectus did not contain the minimum subscriptions on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and, in case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment and the amount actually allowed.

“8. The said prospectus did not contain the time or times on which, under the by-laws of the company, a further call or calls may be made upon shares of the subscriber.

“9. The said prospectus did not contain the number and the amount of shares issued or agreed to be issued as fully or partly paid up, otherwise than in cash and in the latter case the extent to which they are so paid up, and the number and amount of bonds, debentures, or other securities issued or to be issued and allotted to any person.

“10. The said prospectus did not contain the names and addresses of the vendors of any property purchased or acquired by the company or proposed so to be purchased or acquired which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been secured at the date of the publication of the prospectus, and the amount payable in cash, shares,

bonds, debentures, or other securities, to the vendor, and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.

"11. The said prospectus did not contain the amount (if any) paid or payable as purchase money in cash, shares, or debentures, of any property purchased by the company, specifying the amount payable for goodwill.

"12. The said prospectus did not contain the amount paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares in the company or for underwriting or procuring underwriting of any securities issued or to be issued by the company or the rate of any such commission.

"13. The said prospectus did not contain the amount or estimated amount of preliminary expenses.

"14. The said prospectus did not contain the amount paid or intended to be paid in cash, shares, or debentures to any promoter, and the consideration for any such payment.

"15. The said prospectus did not contain the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected.

"16. The said prospectus did not contain the names and addresses of the auditors of the company.

"17. The said prospectus did not contain full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, with a statement of all sums paid or agreed to be paid to him in cash or shares by any person, either to qualify him as a director or otherwise, for services rendered by him in connection with the formation of the company.

"18. The said prospectus stated incorrectly the capital of the Titan Montreal River Mines Limited, whereas it should have stated the capital actually and in good faith subscribed and no more; contrary to the statute in such cases made and provided.

"The complainant prays that a summons may issue and penalty be imposed as therein provided."

And on the 22nd December, 1908, the said defendant, being arraigned upon the said information, pleaded "not guilty," but thereafter certain admissions were made by his counsel, and upon

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such admissions I found the defendant guilty, and a conviction was recorded against him.

2. The said admissions are as follows:—

(a) The Titan Montreal River Mines Limited was incorporated by letters patent on the 17th November, 1908, pursuant to the provisions of the Ontario Companies Act, and made subject to part XI. of the same.

(b) The defendant, J. W. Garvin, is president, F. S. Edmonson is vice-president, and D. A. McPherson, Charles Salkeld, and Charles Holt are the other directors of the said company.

(c) The said company on the 27th November, 1908, filed a prospectus under the provisions of sec. 97 of the Ontario Companies Act, a copy of which is hereunto annexed.

(d) The said company subsequently inserted in certain newspapers published at the said city of Toronto an advertisement in the words and figures following:—

“Montreal River Gold Field.

“Titan Montreal River Mines Limited.

“(a) Authorised capital \$2,000,000 in \$1 shares; treasury, 500,000 shares.

“(b) Four 40-acre claims in Temagami Reserve, west of Willison township, in the now famous Great South Bend district, which includes Gow Ganda, Millar, Bloom, and Alma lakes.

“(c) An immense reef of gold-bearing quartz extends for about a mile across these claims, and averages nearly 50 feet in width. There are also several veins from 4 to 6 feet wide. Surface assays from \$2.40 per ton upwards. Leaf gold and nuggets have been found on surface.

“(d) Quartz and geological conditions similar to the Rand, South Africa; but there are no sulphides—all free milling quartz.

“(e) Shaft down 30 feet and development work being pushed vigorously.

“(f) Five favourable reports in prospectus—three from reliable mining engineers.

“(g) Directors: president, J. W. Garvin, B.A., of Peterborough and Toronto; vice-president, E. S. Edmondson, Esq., general



manager of West Toronto and Oshawa Electric Power Companies; J. H. McKnight, Esq., president of J. H. McKnight Construction Co. Limited, Toronto; D. A. McPherson, M.D., Toronto; Charles Salkeld, Esq., Cobalt; and Charles Holt, Esq., solicitor, London, Eng.

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“(h) No promotion stock. Original owners amalgamated their properties into a joint stock company.

“(i) Directors own 384,500 shares; two directors were among the original owners of the claims; the other four purchased their stock.

“(j) First 100,000 shares of treasury stock offered at the nominal price of 20 cents a share.

“For full particulars apply to J. W. Garvin & Co., financial agents, 29 Manning Arcade, Toronto, Ont., or to any well-known Toronto brokers.

“A thorough investigation is invited.

“Telephone M. 3294.”

(e) The defendant, as well as the other directors of the said company, is responsible for the insertion of the said advertisement in the said newspapers.

(f) The said advertisement was not filed with the Provincial Secretary prior to its insertion in the said newspapers.

(g) It is further admitted that the said advertisement does not contain all the particulars required by the Act to be inserted in the prospectus.

The question for the opinion of the Court is:—

Was the insertion of the said advertisement, under the circumstances herein set out, a violation of the provisions contained in the Ontario Companies Act with reference to the issue and publication of prospectuses?

The appeal of J. W. Garvin, the defendant, upon the case above stated, was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 4th February, 1909.

*A. P. Poussette*, K.C., for the defendant.

*T. Mulvey*, K.C., and *J. W. Seymour Corley*, K.C., for the Crown.

MEREDITH, C.J. (at the conclusion of the argument):—I think this case is reasonably plain, and that the answer to the question



Meredith, C.J. submitted by the police magistrate in the stated case must be in  
1909 favour of the Crown.

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By sec. 95 of the Companies Act, the word "prospectus," as used in part VII. of the Act, is defined to be "any prospectus, notice, circular, advertisement or other invitation offering for subscription or purchase any shares, debentures, or other securities of a company, or published or issued for the purpose of being used to promote or aid in the subscription or purchase of such shares, debentures, or securities."

Then sec. 98 provides:—

"(1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of the publication of the prospectus.

"(2) A copy of every such prospectus shall be signed by every person who is named therein as a director or proposed director or provisional director of the company, or by his agent authorised in writing, and shall be filed with the Provincial Secretary, on or before the date of its publication."

Then there is a provision that the Secretary is not to "receive or file any prospectus unless it is so dated and signed. No prospectus shall be issued until so filed, and every prospectus shall state on the face of it that it has been so filed."

Section 99 is the one which defines what the prospectus shall contain: "99 (1) Every prospectus issued by or on behalf of a company or in relation to any intended company or by or on behalf of any person who is or has been engaged or interested in the formation or promotion of the company, shall state"—then there are set out a number of things that the prospectus shall state.

Section 100 is the section which imposes the penalty for a failure to comply with the provisions of the sections dealing with the prospectus: "100—(1) Every provisional director, director, or other person responsible for the issue and publication of such prospectus, shall for every violation of the provisions of the next preceding three sections be liable on summary conviction to a penalty not exceeding \$200 and costs, provided that no provisional director, director, or other person shall incur any liability by reason of non-compliance with the said sections—(a) As regards any matter not disclosed, if he was not cognisant thereof; or (b) if the non-com-

pliance arose from an honest mistake of fact on his part." Then there is a further provision limiting the liability.

The whole question turns upon what is the meaning of the word "prospectus" as used in sec. 99. I think there can be no doubt that the document which was published in this case, and in respect of which the prosecution took place, was a prospectus within the meaning of sec. 99. It is an advertisement designed to accomplish the purpose mentioned in sub-sec. 1 of sec. 95, which I have read.

It is plain from the Act, I think, that it has in view the issue not of one but of several prospectuses, and the policy of the Act appears to be that upon every occasion upon which the company desire to issue a prospectus for the purpose of inviting persons to take stock or to lend money to or to take the debentures of the company, there shall be a prospectus filed, and that it shall contain the information which the Act requires to be inserted in a prospectus; and that what it requires is that the prospectus, in every case in which a prospectus is necessary, is to be filed with the Secretary, and that the published prospectus shall state on its face that it has been so filed. It seems to me, therefore, that it follows that when the document in question was published it ought to have contained what the prospectus then on file in the Secretary's office contained; and—I leave out of consideration any mere verbal difference—that any difference between the advertisement which was published and the prospectus filed made the publication of the advertisement a violation of the Act and rendered a director who was a party to the issuing of it liable to the penalties mentioned in sec. 100.

It seems to me that the whole purpose of the Act would be defeated if it were permissible to do that which these defendants have done. I have nothing to do with the policy of the Act. It may be that it would sufficiently answer for the protection of the public if a shorter advertisement were permitted than would be necessary if the whole prospectus were inserted.

The case Mr. Mulvey has cited, *Roussell v. Burnham*, [1909] 1 Ch. 127, is in accordance with the view which I have expressed, although the question there arose in a different way.

*Poussette.* May I trouble your lordship for a little more advice on this subject? I apprehend that a mere statement that there

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Meredith, C.J. is such a company offering shares for sale, and that a prospectus can  
1909 be obtained upon application, would not be an infraction of the  
Act?

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MEREDITH, C.J.:—I do not know. I thought at first that it would not; but I think you had better be on the safe side. You see the words are “every advertisement”—it includes circulars or advertisements asking for subscriptions. I am afraid it is within the Act.

Suppose it says: “Company A. B. offers for sale 100,000 shares of \$1 each. Apply to so-and-so.” That certainly would be a prospectus within the meaning of sec. 98.

*Mulvey.* This wording of the Act was taken from the English Act, and it was thought advisable not to vary from the wording of that Act, excepting where the procedure in Ontario varied from that in England.

MEREDITH, C.J.:—Then the answer is in the affirmative, and there will be no costs.

E. B. B.

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## [DIVISIONAL COURT.]

ELLIOTT V. THE MUNICIPAL CORPORATION OF THE  
CITY OF ST. CATHARINES.

D. C.

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Sept. 12.  
Dec. 29.

*Municipal Corporations—Sewer By-law—Disqualification of Member of Council—Private Interest—Consolidated Municipal Act, 1903, sec. 668, sub-sec. 4—3 Edw. VII. ch. 19 (O.).*

A member of a city council is not disqualified from voting upon a proposed by-law to construct a sewer on a certain street within the municipality merely because he owns property fronting on the street, which gives him a large interest in the proposed drainage. The principle that a member of a council is not disqualified merely because he possesses an interest in common with the other ratepayers applies as well where a local improvement by-law being in question, the community of interest is only with the ratepayers of a section of the municipality, as where all the ratepayers will be affected by the proposed by-law.

*Re McLean and the Township of Ops* (1880), 45 U.C.R. 325, discussed and followed.

Judgment of ANGLIN, J., reversed.

THIS was an appeal from the judgment of ANGLIN, J., upon a motion to continue an injunction granted by the local Judge at St. Catharines to restrain the construction of a sewer by the defendants under the circumstances set out in the judgments.

The motion before ANGLIN, J., was made in Weekly Court on September 10th, 1908.

*M. Brennan*, for the plaintiff.

*C. H. Connor*, for the defendants the city of St. Catharines.

*J. S. Campbell*, for the defendants the contractors.

September 12. ANGLIN, J.:—The plaintiff moved to continue an injunction granted by the local Judge at St. Catharines to restrain the construction of a sewer in Gerrard street, in that city, on the ground that by-law No. 1096, under which the sewer is being constructed, though introduced upon the recommendation of the local Board of Health, did not receive the assent of two-thirds of all the members of the city council, as required by sub-sec. 4 of sec. 668 of the Consolidated Municipal Act, 1903. 3 Edw. VII. c. 19 (O.). Of the ten members of the council, seven voted for the by-law. Of these one was Mr. Alderman McBride, who owns property which fronts on Gerrard street, and will be directly and, the plaintiff contends, peculiarly benefitted

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by the construction of the proposed sewer. The plaintiff challenges Mr. McBride's qualification to vote on the ground of his personal interest.

In my opinion, the decision of the Divisional Court in *L'Abbé v. The Corporation of Blind River* (1904), 7 O.L.R. 230, is conclusive in the plaintiff's favour. The property interest of Mr. McBride, in the present instance, seems to me to be quite as great and quite as direct as was that of the reeve in the *Blind River* case. See also *Re Baird and the Corporation of Almonte* (1877), 41 U.C.R. 415, and *Re Vashon and the Corporation of East Hawkesbury* (1879), 30 C.P. 194, 203.

The motion to continue the interim injunction having, by consent, been turned into a motion for judgment, there will be judgment for the plaintiff for a perpetual injunction restraining the construction of the sewer on Gerrard street under by-law 1096, with costs to be paid by the defendants the municipal corporation. There will be no order as to the costs of the other defendants.

The appeal was argued on October 29th, 1908, before MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

*C. H. Connor*, for the defendants, contended that the fact that McBride was a property owner on the street did not disqualify him from voting: *Re McLean and the Township of Ops* (1880), 45 U.C.R. 325, not cited before Anglin, J.; and that *Re Vashon and the Corporation of East Hawkesbury*, 30 C.P. 194, is distinguishable by the fact that there there was a private interest, and not merely, as here, an interest in common with other ratepayers; that it might happen in a municipality that every alderman had property on some street or other, and in this way local improvements might be seriously blocked.

*M. Brennan*, for the plaintiff, relied upon *L'Abbe v. The Corporation of Blind River*, 7 O.L.R. 230.

December 29. The judgment of the Court was delivered by MEREDITH, C.J.:—Appeal by the defendants from the judgment, dated 12th September, 1908, of Anglin, J., by which it is declared that the by-law for the construction of a sewer in the pleadings mentioned was not validly or legally passed by the council of



the corporation, and the defendants were perpetually restrained from constructing the sewer under the authority of the by-law.

The by-law is a local improvement one, and is attacked by the respondent, suing as a ratepayer, on behalf of himself and all other ratepayers, on the ground that it was promoted by one McBride, a member of the council, who was a property owner to be benefitted by the sewer; that it was finally passed at a meeting of the council, seven members voting for its adoption, of whom McBride was one, and that by reason of his interest he was disqualified from voting; and that it was, therefore, not validly passed, a two-thirds vote of the members of the council, which was composed of ten members, being required to pass it.

My brother Anglin was of opinion that McBride, by reason of the circumstances I have mentioned, was disqualified from voting on the motion to adopt the by-law, and that the by-law was therefore not duly passed.

My learned brother, in reaching this conclusion, followed, as he said, *L'Abbé v. The Corporation of Blind River*, 7 O.L.R. 230, which he treated as conclusive in the respondents' favour, and he also referred to *Re Baird and the Corporation of Almonte*, 41 U.C.R. 415; and *Re Vashon and the Corporation of East Hawkesbury*, 30 C.P. 194.

*Re McLean and the Township of Ops*, 45 U.C.R. 325, is not referred to, and it was said, upon the argument before us, was not cited on the argument before my brother Anglin.

In that case the motion was to quash a drainage by-law, and one of the objections to it was similar to that raised in the case at bar.

There the allegation of the applicant was that the by-law was carried by the vote and influence of one Fitzpatrick, a member of the council, and affidavits were filed shewing that he had been for years an active supporter and promoter of the proposed drainage; that he and his brother owned some of the land proposed to be drained; and that he had a large pecuniary interest in the proposed drainage; and that he and his brother would have to pay from one-fourteenth to one-sixth of the assessment imposed by the by-law.

The *Vashon* and *Baird* cases were both cited, but the Court refused to quash the by-law, holding that no interest can dis-

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qualify a councillor or a member of a court of revision from performing his duties as such that springs solely from his being a ratepayer in the municipality, and that Fitzpatrick had no other interest but such as sprang from being a ratepayer in the municipality to be benefitted and in the locality to be drained.

The principle of that decision is clearly applicable to the case at bar, and the judgment appealed from cannot be supported without overruling that decision.

In the *Vashon* case the by-law was one for closing a road, and the only persons interested in the maintenance or closing of it were the applicant and the member of the council who was instrumental in having it passed, and by whose vote it was carried in council.

In delivering the judgment of the Court, Osler, J.A., said that the case "was quite distinguishable from one where the motives merely of the member of the council are in question or where, though he is personally interested, his interest is not different from that of the community in general, *e.g.*, the imposition of a tax rate" (p. 203).

The by-law was held to be objectionable on the further ground "that it was passed to serve private interests and not *bonâ fide* in the interest of the public."

In the *Baird* case the question was as to the validity of a by-law to grant a bonus to a manufacturing company proposed by a council consisting of five members, of whom four were shareholders in the company.

The by-law was quashed because of the provisions of sec. 75 of the Municipal Act (36 Vict. ch. 48, O.), which prohibit a shareholder from voting on any question affecting his company.

Section 75 deals not with by-laws, but with contracts with or on behalf of a corporation, and it was held that the granting of a bonus came within it.

In the *L'Abbé* case the distinction pointed out in the *Vashon* case, to which I have referred, was recognized (p. 237). The by-law was one for reducing the number of licenses in the municipality, and it was quashed on the ground that the reeve, by whose casting vote the by-law was adopted, was mortgagee of one of the properties likely to be affected by it, and therefore disqualified from voting.

The result of these cases is that there is a consensus of opinion that where the personal or pecuniary interest of the member is that of a ratepayer, in common with other ratepayers, or, as put by Osler, J.A., "where, though he is personally interested, his interest is not different from that of the community in general," the member is not disqualified.

The community of interest spoken of I understand to be a community in the kind, not in the degree, of the interest.

It remains to be considered whether this rule is applicable as was held in the *McLean* case, where the community of interest is not between all the ratepayers, but between all the ratepayers to be affected by the by-law, as is the case where the by-law is a drainage by-law or where, as in the case at bar, it is a local improvement by-law.

I see no reason for differing from the view taken in the *McLean* case. As I view it, the principle upon which the rule is founded is the same whether the by-law is one affecting all the ratepayers of the municipality or only those within a section of it.

The principle would be clearly applicable if the by-law in question provided for the work being done and the cost of it provided out of the general funds of the municipality, as it would be in the case of a by-law for undertaking any other work the cost of which is to be provided out of the general funds; and I am unable to see any reason why the principle should not be applied where the same work is being done under the local improvement provisions of the Municipal Act or under the Drainage Act, where part of the cost is borne by the owners of the property benefitted by the work and part by the municipality at large; and it was so applied in *Steckert v. City of East Saginaw* (1870), 22 Mich. 104 (referred to by Osler, J.A., in the *Vashon* case), where the question arose as to a local improvement, and the action of the common council was attacked on the ground that two of the aldermen were petitioners for the work and owners of property liable to assessment therefor, and the judgment of the Court was delivered by a distinguished jurist (Cooley, J.).

In *Buffington Wheel Co. v. Burnham* (1883), 60 Iowa 493, the Supreme Court of Iowa held that a member of a city council, a rule of which forbade members to vote upon questions in which they were directly interested, was disqualified from voting in favour

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of an ordinance authorizing a number of firms to build a side-track from a railway, and distinguished the case of voting upon an ordinance relating to the building of streets and constructing of sewers, Beck, J., in delivering the judgment of the Court, saying: "But the cases supposed by counsel are very different from the one before us. In constructing streets and sewers, in the usual manner, all the people of the city, or, at least, all in the vicinity of the work, are interested alike. They are never built, or should never be built, for the profit of an individual, with incidental benefits to the public" (p. 496).

In the *City of Topeka v. Huntoon* (1891), 46 Kansas 634, *Steckert v. City of East Saginaw* was cited with approval, and it was said that the pecuniary interest to disqualify in the case of a member of a council must be adverse to the municipality.

*Steckert v. East Saginaw* was also approved by the Supreme Court of New York, in *Goff v. Nolan* (1881), 62 Howard's P.R. (N.Y.) 323.

The rule is thus stated in the *Cyclopædia of Law and Procedure*, vol. 28, p. 337 :

"There is a general rule of law that no member of a governing body shall vote on any question involving . . . his pecuniary interest, if that be immediate, particular and distinct from the public interest."

In my opinion, the *McLean* case was rightly decided, and it follows that the judgment appealed from should be reversed and judgment entered dismissing the action.

The respondents should pay the costs of the appeal and of the action, including the costs of the injunction motion.

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## [DIVISIONAL COURT.]

WESTERN AND NORTHERN LANDS CORPORATION v. GOODWIN.

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Jan. 2.

*Mines and Minerals—Surface Rights—Mining Commissioner—Compensation for Surface Rights—Mining Claims on Town Sites—6 Edw. VII. ch. 11, sec. 109, 119 (O.)—Temiskaming and N.O. R.W. Commission—4 Edw. VII. ch. 7 (O.).*

Section 109 of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), which provides that no mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site, whether the same shall have been sub-divided into town lots or not, except by order of the Minister, refers to town sites transferred by Order in Council to the Temiskaming and Northern Ontario R.W. Commission under 4 Edw. VII. ch. 7, sec. 3 (O.), and not to lands merely included on plans registered by private individuals and sub-divided by them into small lots, with streets and avenues.

THIS was an appeal by the plaintiffs from an award of the mining commissioner determining compensation to be paid by the defendant to them as owners of surface rights in respect to a mining claim, under the circumstances mentioned in the judgment. The appeal was argued on November 26th, 1908, before MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

*R. McKay*, for the plaintiffs.

*H. L. Drayton*, K.C., for the defendant.

January 2. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the plaintiffs from the award of the mining commissioner dated 3rd June, 1908, made upon the application to him by the respondent, who is the holder of a mining claim upon the land in question, to have determined the compensation to be paid by him to the appellants, who are the owners of the surface rights, under the provisions of sec. 119\* of the Mines

\*6 Edw. ch. 11, sec. 119: When the surface rights in any land have been granted, sold, leased or located and a mining claim shall be staked out for any portion of the said lands, the licensee so staking out shall compensate the owner, lessee or locatee of the said surface rights, for injury or damages which are or may be caused to the surface rights, and in case the licensee and such owner, lessee or locatee are unable to agree upon the amount of compensation therefor or the manner in which same shall be paid or secured, application by any party interested may be made to the Mining Commissioner to ascertain, determine and prescribe the amount of such compensation and the manner and time in which the same shall be paid or secured. And the same shall thereupon be ascertained determined and prescribed by the Mining Commissioner, or as he may direct, and when so ascertained, determined or prescribed shall be final and binding upon all parties interested.



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Act, 1906, 6 Edw. VII. ch. 11, the payment or securing of which is by sec. 122 a condition precedent to the right of the respondent to a certificate of record of the staking out of the claim.

The appellants object to the question of compensation being dealt with by the mining commissioner, and contend that by reason of the provisions of sec. 109 the land in question was not open for staking out or recording as a mining claim without the order of the Minister of Lands, Forests and Mines, and that no such order was made.

The land on which the mining claim was staked out consists of a farm lot in the township of Bucke, in the district of Nipissing (lot 12 in the 2nd concession). This lot the appellants procured to be sub-divided into a very large number of small lots with streets and avenues, and a plan of the sub-division, which is designated on itself "plan of sub-division of lot 12, concession 2, township of Bucke, Nipissing," to be made. This plan they registered in the proper land titles office, and lots according to the sub-division have been sold by them. All this was done before the staking out of the mining claim.

The sub-division is sometimes called North Cobalt, and houses have been built on some of the lots.

It is claimed by the appellants that in these circumstances the land on which the mining claim was staked out was at the time of the staking out "land included in or reserved or set apart as a town site," within the meaning of sec. 109 of the Act.

The section reads as follows:—

"109. No mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site whether the same shall have been subdivided into town lots or not, or upon any station grounds, switching grounds, yard or right of way of any railway, or upon any colonization or other road or road allowance, except by order of the Minister. Provided that all mines and minerals of every nature and kind in any lands which have been or may hereafter be transferred by any Order-in-Council under authority of chapter seven of the Acts of the Legislature passed in the fourth year of the reign of His Majesty\* shall, unless expressly

\*4 Edw. VII. ch. 7, sec. 3: The Lieutenant-Governor may, from time to time, by Order-in-Council transfer to the (Temiskaming and Northern Ontario Railway) Commission for town sites portions of the ungranted lands of Ontario along the line of railway adjacent to stations . . . .

reserved therein, be deemed to have been and in the case of an Order-in-Council hereafter made, unless therein otherwise expressly stated, shall be deemed to be included as part of the said lands, and the said mines and minerals and the said lands are hereby declared to be exempt from the provisions of this section."

The mining commissioner refused to give effect to the contention of the appellants, and proceeded to determine the compensation to be paid, which he fixed at \$1,500.

We are of opinion that the view of the mining commissioner as to the proper construction of the section was right.

In addition to the reasons given by the commissioner for reaching his conclusion, which are set out in the award, it is to be remembered that the Act deals primarily and mainly with ungranted lands of the Crown, though it does also deal with minerals which have been reserved to the Crown in lands granted by the Crown.

As the commissioner points out, the expression "town site" is used only in two enactments of the Provincial Legislature, the first of these being an Act relating to the Temiskaming and Northern Ontario Railway, 4 Edw. VII. ch. 7, by the third section of which the Lieutenant-Governor in Council was authorized to transfer to the Railway Commission for town sites certain ungranted lands along the line of the railway, and to take compulsorily from the owners for the same purposes other land so situate.

This Act and the Mines Act were passed in the same session, and it seems not unreasonable to infer that the town sites mentioned in sec. 109 were the town sites with which the Legislature was dealing in the other Act. The proviso to sec. 109 does not, as it appears to me, displace this inference; it was added, no doubt, *ex majori cautela*, and to give legislative sanction to the transfer which before then had been authorized by Order-in-Council only.

The use of the words "reserved or set apart" are more applicable to action taken by the Crown than to that of private persons.

It is also to be borne in mind that it was the practice in earlier times—whether that practice is still followed I do not know—in the original surveys of Crown lands, to lay out what were called "town plots," and to reserve lands for town plots. Though the draughtsman of the Mines Act does not use that term, he appears to have had in mind the same thing to which he gave the name of "town sites."

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Nowhere in the Surveys Act, R.S.O. 1897, ch. 181, under the authority of the 39th section of which the appellants' sub-division was made, is a town site spoken of, and in the Registry Act, R.S.O. 1897, ch. 136, sec. 100, which deals with plans of sub-divided lands, the provision is that "where any land is surveyed and sub-divided for the purpose of being sold or conveyed by reference to a plan . . . the person making the sub-division . . ."

To give to sec. 109 the meaning ascribed to it by the appellants would enable the mining districts to be covered with paper towns, the existence of which, though on paper only, would prove a handicap to prospecting and exploring the areas which they embrace, for they could be opened for that purpose only by the order of the Minister, the obtaining of which would involve delay and loss of time, important considerations for the prospector and miner.

That I am not putting it too strongly when I speak of covering the mining districts with paper towns, is shewn by the language of the section which exempts the land whether sub-divided into town lots or not, and there is besides no provision that a plan shall have been registered or even made, and none that lots shall have been sold according to a plan.

I am unable to attribute any such intention to the Legislature, as it would mean that the owner might exclude the prospector or miner while holding in his own hands the power at will to wipe out his sub-division, for that he might do though a plan had been registered as to the whole sub-division, if no lots had been sold according to the plan, and as to practically all except the lots which had been sold, had lots been sold.

In my opinion the appeal fails and should be dismissed with costs.

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[ANGLIN, J.]

LANGLEY V. BEARDSLEY.

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Jan. 21

*Fraudulent Preference—Sale of Business by Husband to Wife—Knowledge of Wife of Husband's Intention to Prefer Certain Creditors—Repayment of Part of Purchase Money to Wife by Way of Preference—Validity.*

An insolvent trader sold out his business to his wife, who was one of his creditors, having means of her own, and who actually raised the money to make the purchase:—

*Held*, that the sale and transfer were valid, notwithstanding that the wife knew of her husband's insolvency and that he intended to prefer certain of his creditors to others by payments out of the purchase money.

The whole of the purchase money of the business was paid over to the husband on the understanding, however, that the wife would at once be repaid the amount owing to her, which was done:—

*Held*, that the transaction must be considered as an advance of the purchase money less the amount owing to her, and that as to that amount it was fraudulent and void, and she was a debtor to her husband's estate for the portion of the purchase money thus paid back to her, and must account for the same to her husband's assignee for creditors.

THIS was an action brought by the assignee for creditors of William Beardsley to set aside a certain sale and transfer made by him to his wife, Sarah Beardsley, and a certain payment made to her as fraudulent as against the creditors of William Beardsley, under the circumstances set out in the judgment.

The action was tried at Ottawa, before ANGLIN, J., without a jury, on January 14th, 1909.

*George Henderson*, K.C., for the plaintiff.

*I. F. Hellmuth*, K.C., and *J. J. O'Meara*, for the defendant Sarah Beardsley.

*M. J. Gorman*, K.C., for the defendant William Beardsley.

January 21. ANGLIN, J.:—The plaintiff is the assignee for the benefit of creditors of the estate and effects of the defendant William Beardsley, under assignment dated November 3rd, 1908. The defendant Sarah Beardsley is the wife of the defendant William Beardsley, and, on the 29th of October, 1908, became the purchaser of the retail boot and shoe business carried on by him in Rideau street, in the city of Ottawa. The defendant Sarah Beardsley was also a creditor of the defendant William Beardsley, and out of the proceeds of the sale to herself of his business obtained payment of the sum of \$610, on account of his indebtedness to her.



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The plaintiff attacks both the transfer of the business to the defendant Sarah Beardsley and the payment to her of the sum of \$610 as fraudulent as against the creditors of William Beardsley.

Prior to the year 1905 William Beardsley's retail boot and shoe business was apparently prosperous and successful. In that year, in partnership with his son, he commenced a wholesale business. He put a considerable amount of his available capital into the wholesale business, which proved unsuccessful. Upon the stocktaking of his retail business in the year 1906 there appeared to be assets of about \$14,000 and debts of about \$2,000, the surplus being in the neighbourhood of \$12,000. Upon stocktaking on or about the 26th of October, 1908, the assets of the retail business were found to have dwindled to about \$6,000, and the liabilities to have increased to a sum between \$5,000 and \$6,000, exclusive of indebtedness to the Standard Bank, the Bank of Ottawa, and the wife, amounting, roughly, to \$3,500 more. The correctness and the fairness of this stocktaking is not seriously questioned.

During the years while the retail business was successful Beardsley had given considerable sums of money to his wife. She had purchased a property and built upon it a residence, both together being worth about \$7,000. She also had some further savings accumulated. Out of these, at her husband's instance, she lent him, for the purpose of the wholesale business, which he told her was in need of money, a sum between \$900 and \$1,000. According to the evidence of both husband and wife—and in this particular I credit their evidence—Beardsley concealed from his wife the financial embarrassment which resulted from the difficulties of the wholesale business, at all events, until the 25th or 26th of October, 1908. Upon the evidence I find it established that up to that time Mrs. Beardsley fully believed that her husband's business was successful. I further find that she was then the real and *bonâ fide* owner of the house and premises in which she lived with her husband; that she had actually advanced to her husband a sum between \$900 and \$1,000 out of her own moneys; and that at the time of the transfer of the business to her she was a creditor of her husband in respect of this advance, a portion of it being collaterally secured by commercial paper of the wholesale business.



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After the stocktaking on or about the 26th of October, Beardsley, fully realizing his insolvent condition, and with the intent of preferring certain of his creditors, including his wife, determined to sell his business. His wife became aware of his purpose to sell, but both he and she insist that she did not know of his intent to prefer creditors or of his insolvent condition. Both husband and wife say that the proposition that the wife should become purchaser came spontaneously from her. Both swear that they dealt with one another as strangers, bargaining as to the sum to be paid, the wife first proposing 50 cents on the dollar, according to the stocktaking, the husband demanding 67½ cents, the wife then raising her offer to 55 cents, the husband dropping to 62 cents, and both finally agreeing on 60 cents. Both say that while this bargaining was in progress the wife was in ignorance of the result of the stocktaking, and did not know what sum of money would be required to enable her to pay for the stock at 60 cents on the dollar. According to the wife's evidence, she then approached a young man, Mr. Younghusband, who was interested in the family, and who happened to be at the house, with a request that he should obtain for her a loan of \$3,000, and with little difficulty she persuaded him to undertake to do so. He corroborates this testimony, and also states that when he promised to procure this sum for Mrs. Beardsley, although he knew that she intended to use it to purchase her husband's business, he did not know the reason for the sale being made, did not know of the husband's insolvency, and did not know the amount that would be required to complete the purchase. After an ineffectual attempt to secure the money from an insurance company, he went to the manager of the Standard Bank, with which his employers did business. That bank was also a creditor of William Beardsley in respect of an overdraft and in respect of commercial paper held under discount. The manager of the bank agreed to lend the sum of \$3,000 to Mrs. Beardsley upon her promissory note, to be endorsed by her young friend, upon the understanding that he would secure himself and the bank by taking from her a mortgage upon her house, which he would assign to the bank, if required.

This loan having been arranged for, Mr. Beardsley was apparently informed that his wife was prepared to purchase,

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and he instructed his solicitor, Mr. Gorman, to prepare a bill of sale from himself to her. Mr. Gorman was also instructed by Mrs. Beardsley's young friend to prepare a mortgage from her to him for the sum of \$3,000. Mr. Beardsley, when giving evidence, professed entire ignorance of this mortgage transaction, stating that he was not present when the mortgage was executed by Mrs. Beardsley, and did not know until afterwards from what source the money was coming or how she had raised it. He is contradicted by Mrs. Beardsley and by Younghusband, who both state that he was present when Mrs. Beardsley executed the mortgage, and that this was done at the same time that he executed the bill of sale, Mr. Gorman having brought both together for execution at the Beardsley residence on the afternoon of the 29th of October. According to the evidence of Mrs. Beardsley and Younghusband, they then for the first time ascertained the amount which it would be necessary to pay for the business, purchasing it at the rate of 60 cents on the dollar, according to the stocktaking of the 26th of October. This sum was computed by Mr. Gorman in their presence, and it was found that \$3,520 would be required. In addition to the \$3,000, the proceeds of the bank loan, for which Mrs. Beardsley gave her cheque to her husband, she also signed two promissory notes in his favour, making together the sum of \$520. Mr. Beardsley thereupon took the \$3,000 cheque and one of the notes, and deposited them to his own credit in the Standard Bank. He immediately drew against the moneys so deposited three cheques, one in favour of the Bank of Ottawa for \$1,500, one in favour of the Standard Bank for \$871.75, the amount of the promissory note held by the bank from the wholesale business and which had been renewed only ten days before, and the third for \$610, payable to Mrs. Beardsley. In addition to the amount of these three cheques, the Standard Bank took for itself the amount of an overdraft in Mr. Beardsley's account. The effect of these payments was to leave the sum of 30 cents to the credit of Beardsley with the Standard Bank. This sum, with book debts amounting to \$16.51 and Mrs. Beardsley's second note for \$260, making in all \$276.81, represented the total assets of the retail business which passed to the plaintiff under William Beardsley's assignment. The creditors' claims presented against this business amount to \$6,081.76, according to the assignee's statement.

The \$610 obtained by Mrs. Beardsley was immediately applied in reduction of the loan upon the house. She raised a further sum of about \$1,600 on an endowment insurance policy on her husband's life, payable to herself. From the business, of which she at once took possession, she has already obtained sufficient money to pay off the balance of her liability to the bank, amounting to \$3,268 in all. The balance of Beardsley's indebtedness to his wife, above the \$610 so paid to her, was collaterally secured by business paper which she held. The effect of the entire transaction was to transfer the Beardsley business from the husband to the wife at 60 cents on the dollar, and to pay in full three creditors of that business—the Standard Bank, the Bank of Ottawa, and Mrs. Beardsley—leaving unsecured creditors with claims amounting to \$6,081.76, to look for payment to the assets delivered to the assignee, amounting to \$276.85.

I find myself unable to accept the testimony of either Mr. or Mrs. Beardsley, or that of the young gentleman who procured her the \$3,000 loan, as to Mrs. Beardsley's ignorance of the circumstances under which her husband was selling the business. It is to me utterly incredible that the husband and wife should have bargained, as they say they did, over the purchase price of the business, he holding out for the highest obtainable price and she trying to beat him down to the lowest possible figure. There are contradictions between the testimony of the husband and wife upon several material particulars which serve to confirm my opinion of their unreliability. Neither can I believe that the balance of the purchase price over the \$3,000 obtained from the Standard Bank was divided into two promissory notes of such amounts that, with the proceeds of one of them, in addition to the \$3,000, the husband could pay the Standard Bank and the Bank of Ottawa in full, and also the unsecured portion of his wife's claim, and leave merely a few cents in the bank, and that Mrs. Beardsley and her adviser were in entire ignorance of the purpose of this division of the purchase money.

While it is said that the purchaser must be shewn (not suspected) to have been privy to the intent to defraud creditors—*Hickerson v. Parrington* (1891), 18 A.R. 635, at p. 640, 641—the circumstances of this case are such that knowledge on the part of the wife of her husband's intent to prefer certain creditors

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and to defeat others is not, in my opinion, merely a matter of suspicion, but is a fair and legitimate inference from the circumstances in evidence. It is not a case of finding a fact to be proved merely because the witnesses who swear to the contrary are discredited. Of the fact itself there is no direct evidence, but other facts are established from which the only fair and reasonable inference seems to be that Mrs. Beardsley, the purchaser, had knowledge of her husband's insolvency, and of his purpose to prefer herself and other creditors in making the sale of his business to her. In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing judicially the *bona fides* of the transaction: *Merchants Bank v. Clark* (1871), 18 Gr. 594.

Yet, where it is shewn, as it is here, that the purchaser had means of her own; that she actually raised the money to make the purchase; that that money was actually paid over to the vendor, and was by him paid out to creditors, the reality of the transaction is established—*Webb v. Hamilton* (1908), 12 O.W.R. 380—and, although knowledge of the intent of the vendor to prefer certain of his creditors to others should be imputed to the purchaser, that knowledge does not of itself suffice to invalidate the sale and transfer of the business. If Mrs. Beardsley had not been herself a creditor of her husband, if she had not as such creditor obtained for herself a portion of the moneys advanced on her account to purchase the business, this case would have been on all fours with *Campbell v. Patterson* (1893), 21 S.C.R. 645. See *Burns and Lewis v. Wilson* (1897), 28 S.C.R. 207, at p. 216. Notwithstanding the facts that Mrs. Beardsley was a creditor and obtained payment, this case seems to me to be within the principle of the decision in *Campbell v. Patterson*, and it is, therefore, my opinion that, upon the present state of the law, the sale and transfer to her cannot be successfully attacked.

But what of the repayment to her of \$610 out of the proceeds of the sale? If the proper view to be taken of the evidence is that the whole purchase money of the business was paid over by Mrs. Beardsley to her husband, so that it was absolutely under his control, and without any bargain or arrangement that his unsecured indebtedness to his wife should be paid out of the pro-



ceeds, her receipt of the \$610 would be "a payment of money to a creditor" within sub-sec. 1 of sec. 3 of the Assignment Act, R.S.O. 1897, ch. 147, and therefore unimpeachable. But if the proper inference to be drawn from the evidence is that the payment of the sum of \$610 as part of the consideration from Mrs. Beardsley to Mr. Beardsley, and the repayment by him of this amount to his wife, were merely colourable acts, and that the real transaction between these parties was that part of the consideration for the transfer from Beardsley to his wife was the payment of her unsecured debt, and that only the balance of the purchase money should belong to Beardsley, to be dealt with as he saw fit, the situation may be quite different. The former portion of the consideration would in that case be something for which the insolvent debtor could not validly make a transfer of his property: only the latter portion would be an actual present advance made *bonâ fide* by the transferee. As to such latter part the transaction might be sustained, while, as to the former, it might be held invalid: *Mader v. McKinnon* (1892), 28 S.C.R. 652, 653.

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There is no suggestion that the Bank of Ottawa was in any way cognizant of the circumstances surrounding the sale of the business to Mrs. Beardsley and of the payment of its claim out of the proceeds of such sale. As to the Standard Bank, while it is impossible to avoid a suspicion that the manager must have known that the indebtedness to his bank would be wiped out, as a result of his advance of \$3,000 to Mrs. Beardsley and her acquisition of her husband's assets, the evidence would not warrant a finding of knowledge on the part of the bank of Beardsley's insolvency or of his intent to prefer the bank to other creditors. There is no doubt that Mrs. Beardsley actually advanced the moneys which were used to pay both the Bank of Ottawa and the Standard Bank. As to this portion, therefore, of the consideration for which she purchased her husband's property, she must be regarded as having made a *bonâ fide* advance of money.

But, in the circumstances of this case, I find it impossible to reach any other conclusion than that payment of the unsecured part of Mrs. Beardsley's claim formed part of the consideration for her purchase of her husband's business. I have no doubt



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that her husband, and, if not Mrs. Beardsley herself, Young-husband, who was acting for her, and whose knowledge must be taken to be her knowledge, were fully aware that she could not make payment of her own claim against her husband part of the consideration for the transfer of the business, and that, if she attempted to do so, to that extent she would be regarded as a debtor of the estate, liable to pay the amount of such claim to the husband's assignee for the benefit of creditors. In order to give the transaction the appearance of an actual *bonâ fide* payment by her to the husband of the whole consideration, and a voluntary repayment by him to her of the amount of her claim out of the moneys under his control, it was given the form of her handing to him a cheque for the whole sum of \$3,000 and also a promissory note for the sum of \$260, which would furnish just sufficient moneys, when the note was discounted, to enable payment to be made in full to the banks and to herself. It was undoubtedly part of the understanding that she would at once be repaid the sum of \$610.

In my opinion, therefore, the transaction should be regarded as a purchase by Mrs. Beardsley of the business of her husband in consideration of her advancing to him the sum of \$2,910 and obtaining payment of her claim of \$610.

If, instead of being a creditor for a sum equal to about one-sixth of the purchase price of the business, Mrs. Beardsley had been a creditor for a sum equivalent to the total price, and, having purchased the business, had paid to her husband in actual money the total purchase price, which had been immediately repaid to her by her husband's cheque in satisfaction of her claim as a creditor, the case would, I think, have fallen directly within *Burns and Lewis v. Wilson*, 28 S.C.R. 217: *Allan v. McLean* (1906), 8 O.W.R. 223, 761. It is, I think, inconceivable that in such circumstances any Court should find that there had been a *bonâ fide* advance or payment by the wife to the husband. The inference that it was a colourable payment merely, and that it was the intention that the whole purchase money should immediately find its way back to the wife, would be irresistible.

Here, as to the sum of \$610, which was immediately repaid to Mrs. Beardsley, having regard to all the circumstances of the case, and particularly to the intervention of Mrs. Beardsley's

astute young friend, the inference seems to me almost equally irresistible that it was part of the consideration for Mrs. Beardsley's purchase of the business that she should be paid in full her unsecured claim. Treating the transaction, therefore, as one in which Mrs. Beardsley's actual advance was limited to the sum of \$2,910, she should, in my opinion, be regarded as a debtor of the estate for the balance of \$610, and should be required to pay that amount to the plaintiff for the benefit of the general creditors of William Beardsley, amongst whom she may rank in respect of this sum. There will, accordingly, be judgment against the defendant Sarah Beardsley for payment to the plaintiff of the sum of \$610. As the plaintiff has succeeded upon a substantial part of his claim, and the costs have not been materially increased by his presenting the other claim, upon which he has not succeeded, and because of the unsavoury character of the entire transaction, I will exercise my discretion over the costs by directing that the defendant Sarah Beardsley shall pay the costs of the plaintiff.

As against the defendant William Beardsley, the action will be dismissed without costs.

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Feb. 1.

*Assessment and Taxes—Tax Sale—Onus—Proof of Validity of Assessment and Subsequent Proceedings—Easement—Extinction by Tax Sale—"Privilege."*

The onus of proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited.

*Jones v. Bank of Upper Canada* (1867), 13 Gr. 74, and *Stevenson v. Traynor* (1886), 12 O.R. 804, followed.

The defendant contended that an easement or right of way enjoyed by the plaintiff over ten feet of land sold for taxes was extinguished by the sale in 1893, as being included in the word "privilege" used in the Consolidated Assessment Act, 1892, sec. 137, then in force:—

*Semble*, that the law of Ontario does not provide for the taxation of easements; and the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by the payment of taxes.

THIS was an action by Hannah M. Essery against Mary Ann Bell for an injunction and damages. The action was begun on the 26th November, 1908.

By her statement of claim the plaintiff alleged as follows:—

(2) That on or about the 24th November, 1882, one John C. Mussen, being the then owner of lots 68 and 69, plan 427, Toronto, did grant to one Sarah A. Campbell a portion of the said lands, with a right of way over the northerly ten feet of lot 68.

(3) That the plaintiff was, on the 26th November, 1908, and still is, the owner of 32 feet 6 inches of land on the west side of Dunn avenue, Toronto, and being part of lot 69 above mentioned, with the right of way appurtenant thereto over, along, and upon the northerly ten feet of lot 68 aforesaid.

(4) That the plaintiff, ever since the conveyance to her of the said lands on the 1st August, 1896, has, and her predecessors in title have, used and enjoyed the said right of way for passage to and from the said lands to Close avenue, from the time of its creation as stated in paragraph 2, until such right was interrupted as referred to in paragraph 5.

(5) That on or about the 15th May, 1908, or shortly thereafter, the defendant wrongfully obstructed the said right of way by erecting a fence or gate or other obstructions across the same,

so as to prevent its being used by the plaintiff and her servants and those lawfully coming to her premises.

(6) That the defendant was at the time of the issue of the writ of summons the owner of lot 68 aforesaid, serving the said right of way and subject thereto.

And the plaintiff claimed: (1) \$500 damages for the wrongs complained of; (2) an injunction ordering the defendant to remove the said fence, gate, or other obstructions from the said lane; (3) an injunction restraining her from the repetition of the acts complained of; (4) general relief.

By her statement of defence the defendant alleged as follows:—

(3) That she is the owner of all of lot 68 aforesaid, and derived title through one Margaret Kelman, who purchased the said property on or about the 15th October, 1903, and the said Margaret Kelman derived title through one George William Warner, who purchased from one Benjamin Taylor on or about the 14th April, 1893, and the said Benjamin Taylor derived title through one William Challenger, who derived title through one William McCabe to the whole of lot 68 under deeds registered on the 20th February, 1894.

(4) That on or about the 3rd February, 1893, the municipal corporation of the city of Toronto, under tax deed for arrears of taxes, granted to the said William McCabe the northerly ten feet throughout from front to rear of the said lot 68.

(5) That on or about the 29th August, 1896, one Christina Kelley purported to grant to the plaintiff lot 69, with a right of way over the northerly ten feet of lot 68, notwithstanding that she, Christina Kelley, had lost all right, title, claim, or interest that she may have had (if any) to the right of way over the northerly ten feet of lot 68, by reason of the said ten feet being sold for arrears of taxes as aforesaid.

(6) That any right, title, or interest that the plaintiff or her predecessors in title may have had in or to the said northerly ten feet has been extinguished by the tax deed of the 3rd February, 1893.

The plaintiff joined issue on the statement of defence.

The action was tried before **BOYD, C.**, without a jury, at Toronto, on the 28th January, 1909.

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*R. S. Robertson*, for the plaintiff.*W. A. Henderson*, for the defendant.

February 1. BOYD, C.:—By statute going back as far as 32 Vict. ch. 36,\* sec. 107 (O.), taxes accrued on any land are made a special lien having preference over any claim, lien, privilege, or incumbrance of any party except the Crown. This provision† was in force during the presumed assessment and the actual sale of the strip of land, ten feet wide, which is the present cause of contention.

The only decision touching on the section that has been brought to my notice is *Tomlinson v. Hill* (1855), 5 Gr. 231, in which a valid tax sale and deed were held to extinguish the inchoate right of dower of the widow of the owner. A parliamentary title was given which was paramount to her claim.

The defendant's contention here is that the easement which was enjoyed by the plaintiff over the ten feet sold was extinguished by the tax sale as being included in the word "privilege" used in the statute. And, no doubt, in *Ramsey v. Blair* (1876), 1 App. Cas. 701, the words "privilege, servitude, or easement" were used as synonymous terms: see pp. 703, 706. Against the status of the defendant it was urged comprehensively that the Municipal Act of 1892 defined "land" and "real property" as including any estate or interest therein or right or easement affecting the same: 55 Vict. ch. 42, sec. 2 (7). This is carried into the present Act of 1903, 3 Edw. VII. ch. 19, sec. 2 (8). And by R.S.O. 1887, ch. 100, sec. 12, the conveyance of a lot includes all privileges, easements, and appurtenances to the lands in any wise appertaining thereto or used and enjoyed therewith. This was in force during the period of assessment herein before the sale. The argument is, that when taxes were imposed on the land owned by the plaintiff, it must be taken that such taxes were imposed in right of this easement, which was expressly attached to the lot by prior conveyances running from the common owner of this and the defendant's lot, and that there could be no sale as for arrears, because all these taxes have been paid.

It was also urged that easements as such cannot be taxed, citing *Chelsea Waterworks Co. v. Bowley* (1851), 17 Q.B. 358.

\* The Assessment Act, 1869.

† See the Consolidated Assessment Act, 1892, sec. 137.

It is not necessary for me to pass upon these different arguments, for the fatal objection to the defence is, that the onus of proving a valid sale for taxes has not been met. The production of the tax deed is not enough—it is a mere starting point; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited: *Jones v. Bank of Upper Canada* (1867), 13 Gr. 74; *Stevenson v. Traynor* (1886), 12 O.R. 804.

This line of evidence is all the more necessary in this case, because the purchaser appears to have been the mortgagee of the servient tenement, over whose soil the easement ran, and whose duty it was to pay the taxes. It would be a piece of strategy not to be encouraged if he let the taxes go into arrear and bought for the purpose of extinguishing the easement subject to which he acquired his mortgage.

But, again, it would be interesting to know upon what principle the taxation was based of this particular ten feet. Was the soil alone taxed, or was regard had to the easement? Or was the easement taken into account with regard to either tenement, the dominant or the servient? Our law seems to be silent on the subject of taxing easements. In the United States the method of procedure is stated to be as follows: when they are appurtenant to the realty, they are to be taxed as part of the land to which they belong; but easements in gross must be valued and taxed separately from the land out of which they are granted: see *Black on Tax Titles*, 2nd ed. (1893), sec. 104.

Certainly it would be an extraordinary state of the law if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes, with right of resort in cases where he is not the proper person to pay. An analogous protection is now given to incumbrancers by the late statute (1904) 4 Edw. VII. ch. 23, sec. 165.

However, no defence being established, the plaintiff's right to the enjoyment of the easement granted in the ten feet should be declared and established by this judgment, with costs to be paid by the defendant.

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IN RE NIPISSING PLANING MILLS, LTD., RANKIN'S CASE.

Jan. 22.

*Company—Petition for Incorporation—Memorandum of Agreement—Subscription to Previous Memorandum—Withdrawal of Subscription—Attending Shareholders' Meeting.*

A company was incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, on April 4th, 1907. One R. did not sign the memorandum accompanying the petition, as prescribed by sec. 10, sub-sec. 2, of that Act, but he had signed a memorandum in the same form subscribing for \$500 of stock in the proposed company, and alleged that this subscription was not meant to bind him unless the company attempted to buy out a certain rival business, and, this not being done, he notified the company before it was organized that he would not take the shares.

In 1907 the company drew on him for calls, but he refused to accept the drafts. In January, 1908, for the first time, the company allotted stock to R., and he attended a meeting of the shareholders on April 6th, 1908, but only to protest against his being considered to be one. No stock certificate was issued to him:—

*Held*, that since the memorandum which R. signed was not the memorandum which accompanied the petition for incorporation, he did not become a shareholder by virtue of the statute, and he was not liable as a contributory on the winding-up of the company.

*Re Provincial Grocers (Calderwood's Case)* (1905), 10 O.L.R. 705, distinguished.

THIS was a motion, on behalf of the liquidator, by way of appeal from an order or report of the local master at North Bay, refusing to settle R. Rankin on the list of contributories under the circumstances mentioned in the judgment. The motion was argued before LATCHFORD, J., in Weekly Court, on January 18th, 1909.

J. A. Macintosh, for the liquidator, contended that the Ontario Companies Act, R.S.O. 1897, ch. 191, sec. 9, had altered the law as it existed in R.S.O. 1887, ch. 157, sec. 4, and provides that subscribers to the memorandum of agreement are constituted shareholders: *In re London Speaker Printing Company* (1889), 16 A.R. 508; that Rankin, upon executing the agreement which he did execute, and the issue of the letters patent, became a shareholder independent of acceptance, allotment or notice of allotment: *In re the Haggert Bros. Manufacturing Co., Peaker and Runion's Case* (1892), 19 A.R. 582; that in this case there was both a subscription for shares and an allotment of which Rankin had knowledge; that no formal or written notice of allotment is necessary: *Nelson Coke and Gas Co.*

v. *Pellatt* (1902), 4 O.L.R. 481, at p. 487; *Newman v. Ginty* (1878), 29 C.P. 34; *In re the Zoological Acclimatization Society of Ontario, Cox's Case* (1889), 16 A.R. 543, at p. 549; *Hill's Case* (1905), 10 O.L.R. 501; that the subscription being under seal, Rankin could not rescind, nor was there any evidence to shew rescission: *Nelson Coke and Gas Co. v. Pellatt, supra*; *Re Provincial Grocers, Calderwood's Case* (1905), 10 O.L.R. 705; that the evidence did not shew that the subscription was on condition precedent which was not fulfilled: *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, at p. 328; that if the company had been successful and Rankin had asserted his rights as a shareholder, the company would have had to admit them: *Nelson Coke and Gas Co. v. Pellatt*, 4 O.L.R. 481, at p. 486; *Re Canadian Tin Plate Decorating Co., Morton's Case* (1906), 12 O.L.R. 594, at p. 600.

C. A. Masten, K.C., for Rankin, contended that the memorandum of agreement referred to in sec. 9 of the Ontario Companies Act, governing this case, R.S.O. 1897, ch. 191, is the same which is referred to in sec. 10, sub-sec. 2, namely, that which accompanies the petition for incorporation; that such a memorandum is a personal agreement between the proposed incorporators, and not an application addressed to the company or to the directors of the company; that Rankin did not sign the memorandum of agreement which accompanied the petition for incorporation; that the document which he did sign was neither the statutory memorandum of agreement nor was it an application to the company after incorporation for shares; that the case, therefore, had to be dealt with as on an oral application for shares, and, as such, the evidence shews that it was conditional: *Re Standard Fire Insurance Co., Turner's Case* (1884), 7 O.R. 448; that there was here no allotment and no notice of allotment to Rankin: *Re Pakenham Pork Packing Co., Galloway's Case* (1906), 12 O.L.R. 100; *Re Constantinople and Alexandra Hotel Co., Reid-path's Case* (1870), L.R. 11 Eq. 86.

He also referred to several of the cases cited by counsel for the appellant.

January 22. LATCHFORD, J.:—Motion by way of appeal from an order or report of the local master at North Bay, refusing to

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settle R. Rankin on the list of contributories of the Nipissing Planing Mills, in liquidation.

The company was incorporated by letters patent under the Ontario Companies Act, R.S.O. 1897, ch. 191, on April 4th, 1907, before the Companies Act of 1907 came into force.

Rankin was not one of the applicants for incorporation, and did not sign the memorandum of agreement executed in duplicate, which, by sub-sec. 2 of sec. 10 of ch. 191, is required to accompany the application for incorporation. In this his case differs from *Calderwood's Case*, 10 O.L.R. 705. The memorandum which was filed with the Provincial Secretary appears upon its face to have been signed and sealed on March 28th, 1907, and is in the form prescribed in schedule A to the Act.

A memorandum in the same form had been signed under seal by the applicants and others, including Rankin, at various dates from March 22nd to March 27th; and after the issue of the charter, from April 18th, 1907, to February, 1908, other signatures were appended. It is argued that by subscribing under seal to this memorandum, Rankin made an irrevocable application for shares in the company; that shares were allotted to him about January, 1908, and that he is liable to be put upon the list of contributories for the par value of such shares—\$500.

The learned master at North Bay has not stated his reasons for his refusal to consider Rankin a contributory, and the matter has therefore to be considered at length upon the evidence.

The agreement which Rankin admittedly executed is as follows:—

"We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the Ontario Companies Act, under the name of the Nipissing Planing Mills, Limited, of North Bay, or such other name as the Lieutenant-Governor in Council may give to the company, with a capital of forty thousand dollars, divided into 400 shares of one hundred dollars each.

"And we do hereby severally and not one for the other subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

"In witness whereof we have signed."

Then follow the names of the subscribers, their seals, amounts, dates and places of subscription, residence, and the names of the respective witnesses.

When Rankin signed this memorandum he intended to subscribe for \$500 stock in the proposed company. His evidence is that his subscription was not meant to be binding unless an attempt were made by the company to buy out a firm or company in North Bay engaged in the business contemplated. This effort, he subsequently learned, was not made; and he thereupon notified one McLaren, the secretary of the company, that he would not take shares. When this notification (which was oral) was given does not appear clearly; but upon the organization of the company, on April 16th, 1907, when shares were allotted to all who up to that date had signed the memorandum executed by Rankin, no shares were allotted to him. To hold him liable there must exist "some response either in writing or verbally or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder:" Gwynne, J., in *Newman v. Ginty*, 29 C.P. 34, cited in *In re Haggert Bros. Manufacturing Co.*, 19 A.R. 582, and there approved. No list of shareholders is produced. In a book lettered on the front cover, "Stock Register," and headed on the page opposite to that on which the name of the first subscriber to the memorandum appears, "Register of ————," the name of Robert Rankin is found at page 17. The entry beneath is: "1907, Meh. 26. Allotment—5 shares—\$500."

This entry is manifestly erroneous, if intended to mean that five shares were allotted to Rankin on March 26th. The company was not then in existence, and it is not pretended that any allotment was made to him until about a year afterward. Two drafts were passed upon Rankin in 1907 for "calls," of which there is no record in the company's minutes; but Rankin refused to accept the drafts. No stock had been allotted to him at this time. Shareholders to whom stock was allotted on April 16th paid a tenth of their subscription monthly during 1907, beginning in May or June.

The company was not successful, and in January, 1908, under instructions from its solicitor, a resolution was passed allotting stock to all who had signed the memorandum signed by Rankin, in-

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cluding those to whom stock had been allotted on April 16th, 1907. Notice of this appears to have reached Rankin, and a letter was written to him by the solicitor for the company claiming payment of the \$500. Rankin attended a meeting of the shareholders on April 6th, 1908, not as a shareholder, but to protest against being so considered. He did not attend any other meetings of the company, and no stock certificate was issued to him.

If he is a shareholder, he must have become so by reason of the memorandum referred to and the allotment of January, 1908. It is contended on behalf of the liquidator that Rankin, by subscribing to the memorandum before the charter issued, became a shareholder by virtue of the statute (sec. 9) and the charter, creating and constituting the petitioners for the charter "and any others who have become subscribers to the memorandum of agreement a body corporate and politic." This would be unanswerable, I think, if Rankin had been one of those who signed the memorandum of agreement referred to in the statute. But that memorandum is clearly the memorandum which accompanies the petition for incorporation. This Rankin did not sign. He did not become a shareholder or incorporator by virtue of the statute.

The memorandum signed by Rankin, though probably intended by him to be an application for shares, must be considered to mean what it says. It is an agreement between Rankin and others to become incorporated under a certain name "or such other name as the Lieutenant-Governor in Council may give to the company." The subscribers mutually agree to take certain shares "and to become shareholders in such company." In terms it anticipates the formation of a company, and is, in fact, the form prescribed by the statute to accompany the petition for incorporation. As in the *London Speaker Printing Co. Case*, 16 A.R. 508, "the instrument he signed was not an agreement with the company:" Osler, J., at p. 521. It was used, however, without regard to its true purpose or meaning. In fact, all the business of the company relating to its stock appears to have been conducted very loosely. The agreement may be enforceable as between the parties to it, if by the breach of some others suffer damage. If it had been followed by allotment to Rankin and participation by him in the affairs of the company, payment by him of calls or acceptance of a stock certificate, it would not be

open to him to deny that he was a shareholder. But no allotment was made to him when shares were allotted to others who had signed when he signed. The company, in the beginning, appears to have treated his application as an oral one, which he had the right to withdraw and did withdraw before the company was organized on April 16th, 1907. Long afterward, when one at least of the officials of the company, with whom Rankin had negotiated, had left North Bay, and the company had become insolvent, an attempt was made to allot stock to him. It is not necessary to consider the manner in which the second allotment was made. I regard it as wholly ineffective as far as Rankin's case is concerned.

I think the learned master was right in refusing to place Rankin on the list of contributories, and the motion must be refused with costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

CANADIAN PACIFIC R.W. CO. v. ALEXANDER BROWN MILLING  
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*Railways—Expropriation—Renewable Lease—Occupation After Expiration of Term Without Renewal—Tenancy at Will—Compensation—"Persons Interested" in the Land—Right to Renew for Part—Railway Act—R.S.C. 1906, ch. 37, sec. 155.*

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Lessees under a renewable lease, or their assignees, where the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not "persons interested" in the land within the meaning of sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, and therefore are not entitled to compensation for expropriation of any part of the lands demised.  
Judgment of RIDDELL, J., reversed.

THIS was an appeal from the judgment of Riddell, J., in this action, which was tried before him, at the non-jury sittings at Toronto, on April 1st, 1908.

The facts are fully set out in the judgment appealed from.

*E. D. Armour*, K.C., and *Angus MacMurchy*, K.C., for the plaintiffs.

*E. E. A. DuVernet*, K.C., and *A. A. Miller*, for the defendants.

April 4. RIDDELL, J.:—The facts are as follow:—

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1881. October 1st.—The city of Toronto leased to the Toronto Grape Sugar Co., their successors and assigns, part of water lots 6 and 7, lying on the south side of the Esplanade, for a term of 21 years from July 1st, 1881. In the lease was a covenant by the lessors thus: "That if at the expiration of the term hereby granted or of any future term of 21 years, the said lessees, their successors or assigns, shall be desirous of taking a new lease of the premises hereby granted for a further term of 21 years, having conformed to all the terms and conditions herein mentioned and set forth, and having given to the council of the said corporation thirty days' notice, in writing, of such desire, the said lessors will, at the costs and charges of the said lessees, their successors or assigns, as aforesaid, grant such new lease for the further term of 21 years from the determination of the present or existing lease, at such rental per foot per annum as the said premises shall then be worth, irrespective of any improvements made by the said lessees, their successors or assigns, such value to be determined" by arbitration. "Provided that if the said lessors do not see fit to renew this or any future lease, the said lessees, their successors or assigns, shall receive from the said lessors such reasonable sum as the buildings and permanent improvements made and erected by the said lessees shall then be worth, such value to be determined" by arbitration.

1889. February 5th.—The Sugar Co. and G. Gooderham, for an expressed consideration of \$10,000, and with the consent of the city, "demised and leased" to the Canadian Pacific Railway Company\* a strip of 28 ft. in breadth of the northernmost part of this lot, with a rental, payable annually, of \$500, the term being for one year from the 5th February, 1889, and thereafter, until the expiration of a notice by the lessors provided for in the lease.

1902. January 31st.—The Sugar Co. and G. Gooderham did "grant, bargain, sell, assign, transfer and set over" unto the C.P.R. "all their estate, right, title and interest in" this strip of 28 ft. It is said that this was assented to by the city, but the formal assent has not been produced.

1902. February 10th.—G. Gooderham assigned to Alexander

\* Hereinafter in this report this company is, for the sake of brevity, referred to as the "C.P.R."

Brown the remaining land—*i.e.*, the land south of the 28-ft. strip—and the buildings thereon. This is assented to by the city.

1902. May 17th.—Alex. Brown assigned this to the defendants, the Brown Co., subject to a mortgage, which the company assumed.

1902. May 22nd.—The Brown Co. and Alex. Brown served written notice upon the council, setting out that Alex. Brown, the present owner of the lease of October 1st, 1881, of the land mentioned, “from which premises have been expropriated a strip of 28 ft. wide from the north side of the property by the C.P.R.,” had transferred his interest to the company, and that Alex. Brown and the company desired “a further lease of the said premises for the term of 21 years from the 1st July, 1902,” to be granted to the company “in pursuance of the provisions in that regard contained in the original lease.”

1902. June 26th.—The city, having received a notice from the C.P.R. for a renewal of lease, served a formal refusal, saying “the said corporation do not see fit to renew the lease of the said lands and premises described in the said notice.”

1902. June 30th.—The C.P.R., requiring a strip south of the 28-ft. strip, served a notice on the city, the Brown Co. and G. Gooderham of an application to be made, July 15th, to the Minister of Railways and Canals, for authority to take such additional strip, 24 ft. 6 in. in width, under the Railway Act, secs. 106-111. An order was made by the Acting Minister on August 29th, 1903, and this was registered September 21st, 1903.

1905. September 22nd.—Notice was served by the C.P.R. upon the Brown Co. that this 24 ft. 6 in. strip was to be taken, and tendering \$1,000 for compensation for the interest of the Brown Co. in this strip. This notice was accompanied by the proper surveyor's certificate.

1905. October 2nd.—Notice was served by the Brown Co. refusing the offer.

No renewal having been made by the city to the Brown Co., but the company remaining in possession of the land, an indenture was afterwards, and on

1906. January 30th executed, whereby the city, after a recital that the C.P.R. had acquired the northerly 52 ft. 6 in. (28 ft. + 24 ft. 6 in.), demised and leased to the Brown Co. the remainder

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C. A. of the land comprised in the original demise for a period of 21  
1908 years beginning July 1st, 1902, at a rental of \$798 per annum,  
C.P.R. Co. in equal half-yearly instalments, except the first, which was  
v. \$199.50 for three months to become due and be paid October 1st,  
BROWN MILLING Co. 1902. In the meantime no rent had in fact been paid by the  
Riddell, J. Brown Co. to the city, and no rent has ever been paid upon the  
24 ft. 6 in. strip since July, 1902.

A considerable amount of correspondence took place between the C.P.R. and the Brown Co. with a view to settle the amount to be paid to the company, but the negotiations failed, and finally

1906. March 9th—an order was made by the Chief Justice of the Common Pleas appointing three gentlemen arbitrators to determine the compensation to be paid to the Brown Co. In the meantime and in

1905. August 11th—the C.P.R. served the city with notice of expropriation for both strips, and negotiations were subsequently had whereby the land was agreed to be conveyed to the C.P.R. I do not think the dates are material, but I have made a memo. of them, which I attach.

The transactions between the C.P.R. and the city are as follow:—

1905. August 11th.—Notice of expropriation covering both strips, 52 ft. 6 in. in all.

1906. March.—Mr. Forman, Assistant Commissioner, was instructed to make a valuation of the city's interest in this and other lands. Negotiations took place between Mr. Forman and the C.P.R., and the value agreed upon.

1908. February 26th.—Mr. Forman reported to the Board of Control. This was referred to the city solicitor on the 27th February, and he

1908. March 4th—reported as to the course to pursue.

1908. March 10th.—The conveyance was settled by council for the city.

1905. October 9th.—An order was made for possession of the 24 ft. 6 in. strip, whereupon the C.P.R. took possession.

A question of law being raised upon this arbitration as to the right of the Brown Co. to receive anything at all, the matter was, under the Arbitration Act, brought before Mr. Justice Clute,

and, at his suggestion, an action was brought to determine the rights of the parties.

No objection was taken, at the trial before me, at the Toronto non-jury sittings, to the jurisdiction of the Court, and both parties desire an adjudication upon the matter.

It is now admitted, and, indeed, the common case, that the rights are to be determined as of September 21st, 1903, as provided by statute, 51 Vict. ch. 29, sec. 145 (D), and now by R.S.C. 1906, ch. 37, sec. 192 (2).

Independently, then, of the date of the "notice to treat," it will be necessary to consider the rights on that day of the defendants the Brown Co., and incidentally of the defendants the city of Toronto.

On September 21st, 1903, the term granted by the lease of 1881 had expired, and had not been renewed. The C.P.R., assignees of the lease so far as the north 28 ft. are concerned, had, after notice to the city of their desire for renewal (May 27th, 1902), been notified by the city (June 26th, 1902) that they would receive no renewal. They had not served, and did not for three years thereafter serve, notice upon the city of expropriation of the 28 ft. strip or of the 24 ft. 6 in. strip. The Brown Co. was in possession of the latter strip. They had (May 22nd, 1902) served notice of desire for renewal, but had received no answer. They were paying no rent, but the city was not interfering with the possession. They had no right of renewal, for the double reason that they were not the assignees of the lease of all the land, and, in any case, the city had an absolute discretion to renew or otherwise. (I have been using the words "renew" and "renewal;" it will be seen that the provision is for "a new lease," "such new lease" to be "for the further term of 21 years from the expiration of the present or existing lease.")

The covenant, such as it is, is to grant the new lease to the "lessees, their successors or assigns." The Brown Co. were not assignees of the lease of all the premises—they could not call for a new lease of all the premises—and it must be clear that the lessors could not be called upon to grant a new lease of part: 18 Am. & Eng. Ency. Law, 2nd ed., p. 691 (c). "Where the lessee has an option to renew the lease, he must, unless the lease expressly otherwise provides, take a lease of the demised premises

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C. A. as an entirety; he cannot demand a renewal with respect to a  
 1908 part of the premises demised in the original lease." *Barge v.*  
 C.P.R. Co. *Schiek* (1894), 57 Minn. 155. In *Cook v. Jones* (1894), 96 Ky.  
 v. 283, it was held, in the particular facts of the case, that all the  
 BROWN assignees jointly might compel the lessor to grant a renewal to  
 MILLING Co. them, but it was not held or suggested that any one assignee  
 Riddell, J. might or could do so.

I have not found any case in the English Courts or our own in which any such claim has been made—perhaps it has been thought too clear for dispute.

A point not dissimilar is dealt with in the case of *Finch v. Underwood* (1876), 2 Ch. D. 310, where it is held that a covenant to renew, being made to two, one cannot insist upon it in favour of himself alone. "But, under the covenant to renew, the tenant can only ask for such a lease as the landlord covenanted to grant, namely, a lease to both tenants:" *per Mellish, L.J.*, at p. 316.

I adopt the language of the Lord Justice, and change the last three words into "of the premises."

And, in any case, the city retained an absolute discretion in the matter, and it cannot be considered that the Brown Co. had any legal right to renewal. They had possession, however, and that was something; the C.P.R. could not eject them; they could give up possession to the C.P.R.; they would sustain damage by reason of the exercise of the powers of expropriation.

The statute provides, 51 Vict. (1888) ch. 29, sec. 92 (R.S.C. 1906, ch. 37, sec. 155): "The company . . . shall make full compensation . . . to all parties interested for all damage by them sustained by reason of the exercise" by the company of the powers granted by the general or special Act. The language of the Imperial Act, 8 & 9 Vict. ch. 20, sec. 6 (the Railways Clauses Consolidation Act, 1845), is a little different: "The company shall make to the owners and occupiers of and all parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers and other parties by reason of the exercise . . . of the powers" given by statute. The Lands Clauses Consolidation Act, 1845, passed the same year (8 & 9 Vict. ch. 18), provides for notice "to all the parties interested

in such lands." Our statute does not say in so many words "interested in the lands," but that is implied from the proceedings prescribed for determining the compensation: R.S.C. 1906, ch. 37, sec. 193 (a) (b), and sections following.

The authority of the English decisions under the two Acts of 1845 should, therefore, be recognized, but I cannot find that possession in itself is not considered an "interest in land." There are cases, indeed, such as *Frank Warr & Co. v. London County Council*, [1904] 1 K.B. 713, in which it is held that the exclusive right to perform certain acts upon the property cannot be considered an interest in land; but that is markedly different from possession. See also *Edwardes v. Barrington* (1902), 85 L.T. 650, in Dom. Proc.

The point seems to be conclusively settled by the Privy Council in *Perry v. Clissold*, [1907] A.C. 73. There the New South Wales statute of 1880, 44 Vict. ch. 16, provided for the "valuation of the land or of the estate or interest of the claimant therein to be made." Clissold had in 1881 entered into possession of certain land, fenced it, and held exclusive possession of it. The true owner of the land, out of possession, was and continued to be unknown. The officer charged with the valuation of the compensation refused to entertain Clissold's claim; in this he was supported by the Supreme Court of New South Wales, but this judgment was reversed by the High Court of Australia. Upon appeal, the Privy Council agreed with the High Court. It is quite true that the Privy Council spoke of Clissold as "a person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership;" but it is plain that the decision does not depend upon the consideration that he was assuming to act as owner, but upon the fact that he was not a mere trespasser. And in the present case, at the time at which the notice of expropriation was given and at the time as of which the compensation is to be computed, the Brown Co. were in possession in the character of tenants, and exercising peaceably the ordinary rights of tenants.

What was the value of the interest?

I assent to the proposition that no compensation can be awarded to anyone who cannot give up or grant anything to the railway company which the railway company cannot obtain despite him. Here the Brown Co. had at least their possession

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to give up, which possession the railway company could not compel the Brown Co. to deliver. Having, then, this, I think it is not alone the legally enforceable rights which the Brown Co. had, but also the benefits which might naturally or probably ensue from the ownership of such rights, which must be considered.

In *In re Cavanagh and the Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, I considered, after a review of certain of the cases, that a hotel-keeper had a right, upon a railway expropriation arbitration, to have taken into consideration the loss of his bar business, though that depended upon the ownership of a license, and he had no legal right to the renewal of his license. I have again gone into the authorities, and remain of the opinion expressed in the *Cavanagh* case. The application of such decisions as that in *Lynch v. Glasgow Corporation* (1904), 5 F. 1174, must be governed by the words of the statutes to be considered: *e.g.*, in the *Lynch* case the statute was (Imp.) 8 & 9 Vict. ch. 19, and that, by sec. 17, provided for determining the value of the interest of the persons concerned; and it decided that the chance or hope of obtaining the renewal of a lease after its expiry is not "an interest in the lands" within the statute.

Our Act, as I have already pointed out, provides for payment of compensation to all persons interested for all damage sustained by them, and the wording is more like that of the Hungerford Market Company statute, 11 Geo. IV. ch. 70, referred to in *Ex parte Farlow* (1831), 2 B. & Ad. 341, and other cases.

I think that no compensation can be claimed by anyone who has not an interest in the land, but that, if one has an interest in the lands, he has a right to compensation for damage which he may suffer, and, in estimating such damages, not alone his strict legal or equitable rights are to be considered, but also the probability of future advantage—of which future advantage he is deprived by the railway company.

In the present case the Brown Co. were in possession by reason of their having been the assignees of part of the leasehold property held under the lease from the city. They were entitled to claim the probability of their being granted a new lease of the strip in question. That is no more an excursion into the realm of conjecture than juries are making every day in estimating damages under Lord Campbell's Act. No one knows how long the widow

will live or live unmarried, and so no one knows the actual amount of damages she will suffer—and, therefore, has in law suffered—but a jury is allowed and directed to consider the probabilities.

The amount of compensation could not be permitted in any case to exceed the value of the fee simple of the land: *Penny v. Penny* (1867), L.R. 5 Eq. 227; and so, in an arbitration concerning this land, an amount would be taken off the sum which otherwise would have been awarded to the owner equivalent to the amount which is awarded to the occupant based upon the market value he has in the land. If the city should eject the occupant before the time at which the compensation is to be fixed, of course he will have no right to compensation. Again, if, as in *Syers v. Metropolitan Board of Works* (1877), 36 L.T. 277, the railway company, instead of filing their plan and serving notice of arbitration, buy out the landlord and give notice to quit, they are not deprived of their common law rights as “assignees of the freehold,” owners of the freehold by the fact that they are also a railway company.

It is argued that the fact that the railway company has obtained from the city an agreement for the land in question—the deed is not yet executed, but it is claimed that the railway company are in equity the owners of the land—ousts the Brown Co. of all right to compensation. I cannot follow that argument: nothing which took place after the crucial day—September 21st, 1903—between the two parties can affect the rights of the third. The probability or possibility of such a transaction coming about is a circumstance to be taken into consideration in determining and diminishing the damage, which is to be fixed as of September 21st, 1903, no doubt; but that is the full extent of its significance. And, in any case, there was the possession. The quantum of damages may be a matter of some difficulty, but that may be left to the arbitrators. The granting of the lease by the city to the Brown Co. will not, in itself, be permitted to increase the damages. The burden upon the railway company must not be increased by any act of the owner after the filing of the plan. That day should probably, in our law, replace the day of service of the notice to treat referred to so often in the English cases: *Zick v. London United Tramways* (1908), 24 Times L.R. 240, at p. 242, and cases there cited; *Mercer v. Liverpool St. Hclens and South*

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*Lancashire R.W. Co.*, [1904] A.C. 461. I do not think, however, that the fact is wholly without significance in the consideration of the probability of a lease having been granted of the strip had the railway not filed their plan and expropriated.

And the acquisition by the railway company of the equitable right to the strip in question will be of assistance in determining the damage from the Brown Co. giving up possession. They had possession until October 9th, 1905, so suffered nothing for that time; then possession was taken from them by reason of the exercise by the railway company of the powers given by the statutes; from that day up to the day upon which the railway company obtained the right as owners of the land to eject them had they remained in possession.

The amount of damage seems to me to be small indeed; but all that is for the arbitrators.

Now, as to the relief specifically asked for.

(a) The plaintiffs claim that the defendants the Brown Co. have had no interest in the strip since the expiration of the lease, June 30, 1902. This claim is negatived.

(b) They claim that the arbitrators had no jurisdiction to arbitrate with respect to the Brown Co.'s interest (if any), inasmuch as they are not persons interested in the lands and seek an injunction. This claim is negatived, and the injunction refused.

(c) They claim that the compensation (if any) should be ascertained with reference to the state of the land at the time of the service of the notice of expropriation, and not at the time of the deposit of the plans, and pray for a declaration accordingly. This claim is negatived and prayer refused.

The defendants say that

(d) They had a legal right to a further lease of the remainder of the lands, and as such and also as being in possession of the lands they are persons interested, and so entitled to compensation.

They will be declared persons interested, and so entitled to compensation from being in possession; but they will not be declared to be entitled to a further lease of the remainder of the land.

(e) They make a further claim not of importance, in view of the fact that the city and the railway company have agreed.

(f) They claim a declaration that the compensation shall be ascertained with reference to the state of the land at the time of the deposit of the plan, etc. This follows from what has been said.

(g) They claim their costs of the action.

They have substantially succeeded, but they set up a legal right to a further lease, in which they have failed. I think they should be allowed three-fourths of their costs of action, with a set-off of one-fourth of the plaintiffs' costs.

I have gone more fully into the matter of quantum of damages than was necessary to determine the questions raised by the pleadings. The different views were urged before me by counsel, and it was apparently desired that I should express an opinion.

The plaintiffs appealed to the Court of Appeal, and the appeal was argued on November 30th, 1908, before Moss, C.J.O., and OSLER, GARROW and MACLAREN, JJ.A.

*E. D. Armour*, K.C., for the plaintiffs (appellants), contended that the defendants had lost nothing for which they were entitled to compensation, because they had nothing to lose; that they had no interest whatever in the land which was taken: *Stebbing v. The Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37; *Perry v. Clissold*, [1907] A.C. 73; *Gedye v. Commissioners of Her-Majesty's Works and Public Buildings* (1891), 2 Ch. 630; *Stroud's Judicial Dictionary*, vol. 2, p. 997.

*E. E. A. DuVernet*, K.C., and *A. A. Miller*, for the defendants (respondents), contended that the defendants had an interest in the property in question and were in possession; that this possession had been taken from them, and they had a right to arbitrate to recover proper damages: *Perry v. Clissold*, [1907] A.C. 73; *In re Cavanagh and The Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523; *McGoldrick v. The King* (1902), 8 Ex. C.R. 169; that mere possession constitutes a legal interest: *Pollock and Wright on Possession at the Common Law*, pp. 22, 93; *Doe d. Hughes v. Dyeball* (1829), Moo. & Mal. 346; that a right of renewal or even a reasonable expectation of renewal is such an interest as entitles to compensation under our Railway Act, R.S.C. 1906,

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- C. A. ch. 37, secs. 155, 198; Woodfall's Landlord and Tenant, 18th ed.,  
 1909 p. 434; *Plimmer v. Mayor of Wellington* (1884), 9 App. Cas. 699;  
 C.P.R. Co. Am. & Eng. Ency. of Law, 2nd ed., vol. 18, p. 688; that the  
 v. grant by George Gooderham of February 5th, 1889, was not  
 BROWN really voluntary, but was the result of expropriation proceed-  
 MILLING CO. ings, and the exercise of rights of expropriation as to part of the  
 land should not destroy the right of renewal as to the remainder:  
*Manchester, Sheffield and Lincolnshire R.W. Co. v. Anderson*, [1898]  
 2 Ch. 394, at p. 403; that, as between lessor and lessee, the term  
 should be implied that expropriation of a small strip of the de-  
 mised land shall not destroy the lessee's right to a renewal in  
 respect to the remainder; *Lamb v. Evans*, [1893] 1 Ch. 218, at  
 p. 229; *Ex parte Ford, In re Chappell* (1885), 16 Q.B.D. 305, at  
 p. 307; *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180.  
*Armour*, in reply.

January 19. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the plaintiffs from the judgment, at the trial, of Riddell, J., as set out in the appeal book.

In the case stated the questions to be determined are:—

(1) Have or had the claimants any interest in the said lands entitling them to receive compensation from the respondents under the circumstances stated? If so, what is the "interest" and on what principle ought compensation to be ascertained?

(2) If the claimants are entitled to receive compensation from the respondents, with reference to what date ought compensation to be ascertained?

This differs somewhat, but not materially, I think, from the special case stated by the arbitrators, which had three questions, but all involving practically the same point.

The material facts, about which there is no dispute, all appear in the pleadings and in the judgment.

The judgment proceeds upon this, that, although the claimants had no legal title, they still had possession under the lease which expired on June 30th, 1902, and that such possession, with the possibility of obtaining a renewal, for which they had asked, was sufficient upon which to found a valid claim. And the whole question really is whether that conclusion correctly interprets the law.

In considering the numerous cases upon the subject, regard must, of course, be had to the statutory provisions under which they arose and were decided. The Imperial statutes, 8-9 Vict. ch. 20 and 8-9 Vict. ch. 8, have now been in force for many years without material alteration. And, while their provisions are much more extensive and minute than those to be found in the Canadian statutes, I agree with Riddell, J., that for the purpose of the present inquiry there is no such essential difference as to make the cases decided under the Imperial statutes inapplicable in construing ours.

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Our Railway Act, R.S.C. ch. 37, as consolidated in 1906, did not, I think, alter the law in any material particular from the condition in which it stood on September 21st, 1903, when the plan was deposited and the rights of the parties to that extent fixed (see sec. 192), and my references will, for convenience sake, be to it.

Section 155 provides that "full compensation" shall be made "to all persons interested for all damages by them sustained" by reason of the exercise of the powers of expropriation conferred by that Act. Throughout the statute the estate or interest (with some trifling exceptions) assumed to be expropriated is the fee simple; and the compensation, when fixed, shall, it is provided, stand in place of the land: see sec. 213.

By sec. 191, after the expiration of ten days from the deposit of the plan, etc., and the due publication of notice, application may be made to the owners, or to persons empowered to convey or interested in lands which suffer damage from the taking of materials or the exercise of powers, and such agreements and contracts as both parties may deem expedient may then be made touching the lands or the compensation, or for damages, or as to the mode in which the compensation is to be ascertained, and, if they cannot agree, all questions which arise between them shall be settled as thereafter provided, namely, by arbitration.

In the Imperial statutes provision is made for compensation to tenants of various terms, down to that of "a tenant having no greater interest than as tenant for a year or tenant from year to year." See sec. 121 of the Land Clauses Consolidation Act, 1845, the second of those above mentioned. And sec. 122 provides for the compulsory production of the lease in the case of



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any tenant claiming compensation and having a greater interest than as tenant at will. For the latter no provision of any kind is made, which seems to indicate that a tenant at will was not regarded as a person having an interest in the land. And yet the Imperial Acts extend to "occupiers"—a word not found in our statute—and contain also the more general words, "persons interested in the lands," common to both, in this respect being, therefore, more favourable in its language to a claimant situated as these claimants are than the Canadian statute.

Notwithstanding the use of this word, it was recently said, in the Court of Appeal, by Collins, M.R., that the subject matter for compensation under the Imperial statute is land or an interest in land: see *Frank Warr & Co. v. London County Council*, [1904] 1 K.B. 713, at p. 717; and the Court there sustained a judgment denying the right of a claimant to what was, undoubtedly, a valuable privilege to occupy land, simply because the privilege did not create an interest in the land itself.

And the same construction must, in my opinion, be placed upon the Canadian statute. The persons "interested" must be persons who have some definite interest in the land itself. The mere possession or occupation as tenant at will, which correctly expresses the legal position of these claimants after their lease expired, is not, I think, sufficient.

In the case referred to by Mr. DuVernet, of *McGoldrick v. The King*, 8 Ex. C. R. 169, the facts were very different, for it was there found that the tenant, after the original lease had expired, remained in possession as tenant from year to year—in other words, he was not a tenant at will, when the expropriation took place. And he was therefore held entitled to compensation for the unexpired portion of his term as such tenant, and also for his improvements.

In *Rex v. Liverpool and Manchester R.W. Co.* (1836), 4 A. & E. 650, the tenant had had several renewals, and even had a verbal promise of a further renewal for seven years from his landlord, on the faith of which he had expended money, and yet the Court held that he had no interest in the land, his lease having, in fact, expired, and could not, therefore, claim compensation. The language of the statute there in question is very similar to that of the general Imperial Act from which I have quoted, and included, as that statute does, "occupiers," as well as owners and persons interested.

And in *Syers v. Metropolitan Board of Works*, 36 L. T. 277, it was held by Jessel, M.R., and affirmed by the Court of Appeal, that a tenant, whose term had been duly determined by notice to quit, could not claim compensation, although he, with at least some show of reason, claimed that but for the expropriation proceedings he would probably not have been disturbed. In the recent case referred to in the judgment of Riddell, J., of *Zick v. London United Tramways*, [1908] 1 K.B. 611, also affirmed by the Court of Appeal in 24 Times L.R. 577, it would have been a simple proposition if the plaintiff's possession alone had been sufficient. He, too, was a tenant in possession, but for an unexpired term, which, fortunately for him, had not merged, owing to the imperfect surrender, and the recovery was had not in respect of the possession, but clearly of this unexpired term alone.

These cases are not inconsistent with such cases as the one so much relied on of *Perry v. Clissold*, [1907] A.C. 73; and *Ex parte Chamberlain* (1880), 14 Ch. D. 323; and *Stewart v. Ottawa and New York R.W. Co.* (1899), 30 O.R. 599.

In the last of these cases the learned Chancellor pointed out the scope and principle of such statutes, and shewed that there are really two stages—one, the ascertainment of the party to be dealt with in proceeding to fix the compensation; the other, the right to the compensation itself after it is fixed. And as to the first, it was there held, quite in accordance with the more recent case in the Privy Council, that where a person is found in possession apparently as owner, which is not at all the position of these claimants, he may be dealt with, for the purpose of the first stage, as if he was in fact the owner, and that the statutory body cannot at that stage put him to proof of title. But, after the compensation has been fixed, and has been paid into Court, as it may be (see sec. 210), the person applying for it—who need not have been named in the award: see sec. 205 (2)—would certainly then be required to prove his title before obtaining the money out of Court.

None of these cases, nor, indeed, any of the other cases which, after a somewhat diligent search, I have been able to find, affords any foundation, in my opinion, for the proposition that a person, having no estate and no interest in the land itself—nothing, in fact, but mere possession—has any right to share in the compensation provided for by the statute.

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The cases decided under the statute 11 Geo. IV. ch. 20, the Hungerford Market Act, referred to by Riddell, J., are not, in my opinion, at all in point. Section 19 of that statute, the foundation for such decisions, has no counterpart in our statute nor in the general Imperial Acts. And that they are exceptional was pointed out by Lord Denman, C.J., who presided in them all, in the later case, before referred to, of *Rex v. Liverpool and Manchester R.W. Co.*, 4 A. & E., at p. 656. The cases to which I refer are *Ex parte Farlow*, 2 B. & Ad. 341 (to which Riddell, J., referred with apparent approval), and *The King v. The Hungerford Market Co.*, *Ex parte Gosling* (1833), 4 B. & Ad. 596. Section 19, before mentioned, is as follows:—"All tenants for years or from year to year or at will, who shall sustain any loss, damage or injury, in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act, shall be entitled to compensation."

I have not attempted to follow all the arguments addressed to us by the learned counsel for the claimants. As will have appeared, the material fact upon which I proceed is of the very simplest, and it is this—the claimants are not entitled to compensation because they had on the date in question no estate or interest in the lands. It matters not, in my opinion, how the severance of the reversion, which stood in the way of renewal, came about, nor whether such severance was compulsory or voluntary, or even whether there ever had in fact been a severance at all, the undisputed fact being that the prior lease had expired on June 30th, 1902, and had not been renewed, and no new tenancy created, thus leaving the claimants entirely without title or interest in the land. The lessors were not even bound to renew or to grant a new lease. They had the option to refuse, and in that case to pay for the tenants' improvements. They did refuse, and what (if any) obligation between the claimants and the city follows upon such refusal we are not at present required to nor in a position to deal with.

In my opinion, the claimants, for the reasons stated, have failed to make out a valid claim to compensation, and the appeal should therefore be allowed with costs.

## [IN THE COURT OF APPEAL.]

## RE CORNWALL FURNITURE COMPANY, LIMITED.

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Jan 19.

*Company—Winding up—Reference to Officer of Supreme Court—Settling List of Contributories—Certificates Declaring Stock Paid Up in Full—Right of Officer to Inquire whether Payments Made.*

Where, under an order of a High Court Judge, a reference has been directed to an officer of the Supreme Court of Judicature to take all necessary proceedings for the due winding up of a company, and delegating to him for such purpose the powers conferred on the Court therefor by the Winding-up Act, such officer has jurisdiction, in settling the list of contributories, to inquire into and decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon.

*Re Harris, Campbell and Boyden Furniture Co. of Ottawa* (1905), 5 O.W.R. 649, and *Re Hess Manufacturing Co.* (1904), 23 S.C.R. 644, considered and explained.

THIS was an appeal by J. C. Milligan, the liquidator of the Cornwall Furniture Company, Limited, leave for which was given by an order of this Court, dated June 6, 1908.

The appeal was against the judgment of Latchford, J., dated May 23rd, 1908, dismissing an appeal by the liquidator from the judgment of the local master at Cornwall, dated May 8, 1908, who, without going into the merits of the case, held that he had no jurisdiction to settle the list of contributories.

On September 25, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*C. H. Cline*, for the appellant. The respondents waived any question of jurisdiction by submitting to the jurisdiction of the master. The master did not attempt to try the question as to whether any consideration had been given by the respondents for the stock. It appeared that no consideration was given for the stock, and in such case the master had jurisdiction to deal with the question of the respondents' liability. By secs. 48 to 60 of the Winding-Up Act, R.S.C. 1906, ch. 144, power is conferred on the Court to settle the list of contributories and to adjust their rights as amongst themselves; and by sec. 110 the Court may delegate such power to any officer of the Court, and by the order made herein such power was delegated to the local master, who had jurisdiction to deal with the matter. The learned master held



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that he was bound by the judgment of MacMahon, J., in *Re Harris, Campbell, and Boyden Furniture Co. of Ottawa* (1905), 5 O.W.R. 649, and *Re Hess Manufacturing Co.* (1904), 23 S.C.R. 644, 653. All these cases decide, however, is that where a consideration is given for the purchase of stock the value of that consideration will not be inquired into. Here the question is, was any consideration at all given for the stock, and this the master should have inquired into.

*George A. Stiles*, for the respondent, James E. Wilder, one of the contributories. The respondent does not object to the jurisdiction of the local master. The master himself decided that he had no jurisdiction. The respondent's desire is that the point should be decided one way or the other. If this Court decide that he has jurisdiction, the respondent is perfectly willing to appear before him and have the matter investigated. The respondent, however, is a resident of the Province of Quebec, and was not served with the notice required in such case. He, however, appeared by counsel before the master, and if the Court are of opinion that the master could deal with his case he is satisfied.

January 19. Moss, C.J.O.:—This appeal raises a somewhat important question as to the extent and scope of the jurisdiction that may be exercised by an officer of the Supreme Court of Judicature in a proceeding under R.S.C. 1906, ch. 144, the Dominion Winding-Up Act.

The company is in process of being wound up under the provisions of that Act. By an order pronounced by Mr. Justice Anglin it has been referred to the local master of the Supreme Court of Judicature at Cornwall to (amongst other things) take all necessary proceedings for and in connection with the winding-up of the company.

The order further provides that, in pursuance and by virtue of the statute in that behalf, all such powers as are conferred upon the Court by the Winding-Up Act and amending Acts as may be necessary for the said winding-up of the said company be and the same are delegated to the said local master.

In a proceeding before the local master, upon the application of the liquidator of the company to place certain persons on the list of contributories as the holders of unpaid shares, it

was objected that, in the circumstances appearing in the case, he had no jurisdiction to deal with the matter.

He considered himself bound, in deference to some decisions, to give effect to the objection, though his own opinion was opposed to it.

On appeal, Latchford, J., affirmed the order, without expressing any opinion of his own.

The persons who are sought to be placed on the list of contributories hold certificates to the effect that the shares are fully paid up, but the contention of the liquidator is that the certificates were issued without any payment or consideration to the company, and that, in truth, the shares in question are wholly unpaid.

The question is thus raised as to the extent and scope of the jurisdiction of the local master to proceed with the inquiry before him as to the liability of these persons to be placed on the list of contributories in respect of those shares.

It must, of course, be conceded that the local master, in proceeding in this matter, has jurisdiction to settle a list of contributories, and, as incidental thereto, to inquire whether a person appearing to be a holder of shares does or does not owe anything in respect of them. The jurisdiction of the Court to do this is, of course, unquestionable.

Then sec. 110 of the Act authorizes and empowers the Court to "refer and delegate, according to the practice and procedure of the Court, to any officer of the Court any of the powers conferred upon the Court by this Act."

It is to be observed that the powers to be delegated are confined to those conferred by the Act. The officer is not made the recipient of any of the original jurisdiction possessed by the Court.

The order made in this matter is in conformity to the Act, and delegates to the local master all such powers as are conferred by the Act upon the Court as are necessary for the winding-up of the company. It goes almost without saying that the ascertainment of the persons, if any, who are holders of unpaid shares, and the amount, if any, which they are liable to pay in respect of them, is essential to the due winding of the company's affairs.

It must be assumed that, in proceeding with such an inquiry,

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the Court, and, by consequence, the officer to whom its powers have been delegated, will be governed by the provisions of the Act, and will prosecute the inquiry in the form and manner best adapted to secure justice to all concerned.

In the simple and ordinary case of a subscriber for shares who appears not to have paid the amount payable in respect of them, no difficulty is likely to arise. And, doubtless, a great many of the cases which come up are of that nature.

But cases may arise in which there is more complication, in which the rights of other parties are involved, or in which the circumstances are of such a special nature as to make it more proper or more convenient or more consistent with the attainment of complete justice to invoke the ordinary jurisdiction of the Court for the enforcement of the asserted claims, the powers conferred by the Act being additional and not restrictive: sec. 130.

If such a case presented itself, the delegated officer would necessarily stay his hand, for he can only exercise the powers conferred by the Act, leaving it to the Court to deal with it in the manner deemed most expedient.

Ordinarily the answer of a person whom it is sought to place on a list of contributories will be found ranged under one or more of the following: either that he is not a shareholder at all or that he has paid in full the amount payable in respect of his shares, or that he is entitled to be relieved from liability in respect of them by reason of some special circumstances. In whatever way it may be put, his defence is substantially a denial of liability. In none of these cases is it at all likely that there will arise any special question involving inquiries into and the settling of rights of third parties or the adjusting of conflicting claims between parties not before the Court, so as to prevent the Court from dealing with the cases in the manner prescribed or indicated by the statute. In nearly every case the simple question is, is the person appearing to be the holder of shares liable to payments in respect of them? And that question, there can be no reason to doubt, the delegated officer may properly entertain and deal with.

His jurisdiction is not limited to cases where no defence is

made to the claim, and all that has to be done is to ascertain and state the amount payable.

The obvious intention of the Act is to provide means for settling and adjusting all questions arising in the ordinary course of the liquidation in the simplest and shortest manner, so that, in the words of Sir G. M. Giffard, L.J., in *Re Mercantile Trading Co., Stringer's Case* (1869), L.R. 4 Ch. App. 475, 493: "Without any double process or double set of proceedings, complete justice might be done between the parties and a complete winding-up effected."

The local master was of the opinion that he had jurisdiction to proceed, and he would have exercised it but for the supposed effect of the decision on the case of *Re Harris, Campbell and Boyden Furniture Co. of Ottawa*, 5 O.W.R. 649, which appears to have been based on some remarks of Sir Henry Strong, C.J., in the case of *Re Hess Manufacturing Co.*, 23 S.C.R. 644, at p. 653.

But these observations must be read in the light of the facts and circumstances of the case with which the learned Chief Justice was dealing. In that case it was proved that the alleged contributory had given value in kind for the shares in respect of which it was sought to hold him liable, and the learned Chief Justice was combatting the argument that, in a proceeding to place the alleged contributory on the list, it was competent either for the master or the Court to inquire into the sufficiency of the value given.

This seems clear from the citations he makes from the text books to which he referred. The learned authors were not dealing with the question of jurisdiction, but with the principle of law to be found in the passages which he quoted—viz., that in the absence of fraud the Court [not the delegated officer merely] will not inquire into the value of that which is taken by the company in payment instead of money.

The learned Chief Justice shews that this was what was in his mind, for he says (p. 654): "If any consideration was given it was beyond the master's competency to inquire into the adequacy of it," which would certainly be so if, as stated by the learned authors, the Court would not do so.

The case cannot be considered as laying down as an absolute proposition that the production of a fully paid up certificate at

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once ousts the master's jurisdiction to inquire and determine whether anything has been paid or the company has received any value for the shares.

Whether in the present case the holders of certificates for what have been termed "bonus shares" may relieve themselves from liability on the ground that they never subscribed for the shares, and only accepted them on the basis that they were only to become holders of them as fully paid-up shares, or on the ground that the proceedings should be under sec. 123, or on the ground of estoppel, or on any other ground, are matters not now before us for consideration. They are to be dealt with by the local master if and when put forward. They do not at present affect the question of jurisdiction.

In the circumstances, so far as they now appear, the conclusion is that the local master has jurisdiction to proceed with the inquiry against the persons brought before him, and it should go back to him to continue it.

The appeal will therefore be allowed. The liquidator's costs will be paid out of the estate, and there will be no costs to any of the other parties.

MEREDITH, J.A.:—To say that there was no power, under the Winding-Up Act, to determine the question as to liability to pay for the shares in question in this case would be tantamount to saying that there is no such power in any case in which the liability is disputed. As far as anyone can at present foresee, the case is a simple one, affecting only the liquidator and the shareholders whom he seeks to charge with the price of the shares in question. No other property and no other persons are directly concerned in it. As far as disclosed, on such evidence as has been yet adduced or by the admitted facts, nothing was paid for the shares in question by the holders of them; but such shares were given to them, as if fully paid up, in consideration of their taking a certain number of unpaid shares of the capital stock of the company. So that really the questions in issue are substantially questions of law, and are in no sense complicated in any respect.

One purpose of the Act is to have all the affairs of the company wound up, and the rights of all persons concerned in it ad-

justed and finally disposed of, as far as practicable, in the winding-up proceedings. Litigation by the ordinary methods of procedure are, or ought, not to be permitted in cases in which the rights of the parties can be fairly and fully dealt with in the winding-up proceedings.

The learned Judge was of opinion that the decided cases precluded him from exercising any power in the matter, though, but for them, he would have had no doubt of his jurisdiction. The cases to which he referred are: *Re Hess Manufacturing Co.*, 23 S.C.R. 644, and *Re Harris, Campbell, and Boyden Furniture Co. of Ottawa*. The former case was one of a very different character, and was not decided on the question of jurisdiction, but upon its merits, though it was one of the propositions of the learned Judge who wrote the judgment of the Court that there was no jurisdiction under the Act. If there were no jurisdiction in the lower Courts to deal with the case upon its merits, there was equally none in the Supreme Court. For both reasons that case is not, in my opinion, one requiring the conclusion to which the learned Judge below came. The other case is not reported in the regular reports: see 5 O.W.R. 514, 649; and in the absence of a knowledge of all of its facts, it can be but a dangerous guide.

On the other hand, in the case of *Re Pakenham Pork Packing Co.* (1903), 6 O.L.R. 582, there was a distinct decision in favour of the jurisdiction. A sequel to that case is, it seems, to be found in the case of *Re Pakenham Pork Packing Co.*, in this Court (1906), 12 O.L.R. 100.

The difference between a want of jurisdiction and a finding which takes a case out of the category of one of unpaid shares, or, for other reasons, one in which, whatever other obligations there may be, there is no liability to contribute as a holder of unpaid shares, must be observed. Even from the judgment in the *Hess* case, it is plain that if the shares in respect of which it is sought to impose liability can be treated as unpaid, there is jurisdiction: see pp. 659, 660; and it was on that ground that liability, in that case, was imposed in the Courts of first instance. It was there found that the person charged was a trustee for the company, who had been repaid all his advances out of the proceeds of the mortgage put upon the property. The Court of Appeal and the Supreme Court came to the conclusion

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that he was not at all a trustee of the property, but was the beneficial owner of it, and had paid for his shares with it, and so, upon the merits of the contention, relieved him.

*Ex p. Daniell* (1857), 1 DeG. & J. 372 and 23 Beav. 568; see also (1856), 22 Beav. 43, and *Re Western of Canada Oil, Lands and Works Co.* (1875), 1 Ch.D. 115, were cases like this, and were dealt with, as very many others of a like character have been, in winding-up proceedings. In the first-mentioned case liability to contribute was adjudged and enforced; in the other it was considered that there was no such liability, and the liquidator was left to any other remedy he might have.

There was, in my opinion, jurisdiction, and, therefore, I would allow the appeal.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

G. F. H.

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## [IN THE COURT OF APPEAL.]

MILLIGAN V. TORONTO R.W. CO.

C. A.

1909

Feb. 11.

*Supreme Court of Canada—Leave to Appeal to—Jurisdiction of Court of Appeal—Supreme Court Act, secs. 48 (e), 69, 71—Extension of Time for Appealing—Amount Involved—Special Circumstances—Difference of Opinion in Court of Appeal.*

The Court of Appeal has jurisdiction, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under sec. 71, to extend the time for appealing, even after the sixty days allowed by sec. 69 have expired.

The Court (MEREDITH, J.A., dissenting) refused leave to appeal from the judgment in 17 O.L.R. 530, deeming that there were no special circumstances which would take this case out of the general rule that litigation involving no more than the sum of \$1,000 should cease with the rendering of judgment by the Court of Appeal.

The mere fact of a difference of opinion among the members of the Court is not, in itself, a sufficient reason for treating a case as exceptional.

MOTION by the defendants, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 17 O.L.R. 530; and, under sec. 71 of the same Act, to extend the time for bringing the appeal.

Section 48 provides that "no appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless:—

"(a) The title to real estate or some interest therein is in question;

"(b) The validity of a patent is affected;

"(c) The matter in controversy in the appeal exceeds the sum or value of \$1,000 exclusive of costs;

"(d) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or

"(e) Special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted."

Section 71 provides that, "notwithstanding anything herein contained, the Court proposed to be appealed from, or any Judge thereof, may, under special circumstances, allow an appeal,



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although the same is not brought within the time hereinbefore prescribed in that behalf."

By sec. 69, "except as otherwise provided, every appeal shall be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from."

This action was brought to recover damages for injuries sustained by the plaintiff by a collision with a car of the defendants. The action was tried before Clute, J., and a jury; judgment was entered for the plaintiff for \$1,000 damages; the defendants appealed to a Divisional Court, which unanimously affirmed the judgment at the trial; the defendants then appealed to the Court of Appeal, which, on the 10th November, 1908, gave judgment affirming the order of the Divisional Court; two of the five Judges composing the Court of Appeal dissenting.

The defendants, proposing to appeal to the Supreme Court of Canada, gave security, and applied to a Judge of the Court of Appeal for approval of the security and allowance of the appeal. Maclaren, J.A., held (17 O.L.R. 370) that the amount of the judgment, \$1,000, with accrued interest, \$43.05, brought the case within sec. 48 (e), *supra*, and made the order asked for.

The appeal was then proceeded with, but when it came before the Supreme Court of Canada, it was quashed, on the ground that there was no right to appeal without leave: see note on p. 371 of 17 O.L.R.

The present motion, for leave and to extend the time, was launched before the expiry of the 60 days allowed by sec. 69, but did not come on for hearing until after the 60 days had expired.

It was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 19th January, 1909.

Wallace Nesbitt, K.C., for the defendants, contended that the case was one in which special leave should be granted; and that the Court had power to grant leave and extend the time for bringing the appeal even after the time had expired.

G. F. Henderson, K.C., for the plaintiff, *contra*, referred to *Lake Erie and Detroit River R.W. Co. v. Marsh* (1904), 35 S.C.R. 197, *per* Nesbitt, J., at p. 199; *Canadian Mutual Loan and Investment*

*Co. v. Lee* (1903), 34 S.C.R. 224; *Barrett v. Syndicat Lyonnais du Klondyke* (1903), 33 S.C.R. 667; *Vaughan v. Richardson* (1890), 17 S.C.R. 703; *Cameron's Supreme Court Practice* (1907), p. 341; *News Printing Co. of Toronto v. Macrae* (1896), 26 S.C.R. 695, 699.

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February 11. Moss, C.J.O.:—The defendants moved, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, for special leave to appeal to the Supreme Court, and, under sec. 71 of the same Act, to extend the time for bringing the appeal. A similar motion was at the same time made on behalf of the defendants in a case of *Irving v. Grimsby Park Co.*\* The respective respondents, among other answers to the applications, raised the objection that, inasmuch as these were cases in which no appeal to the Supreme Court lay as of right, and as the 60 days within which an appeal is required to be brought, as enacted by sec. 69 of the Supreme Court Act, had expired, this Court had no jurisdiction to entertain the motions. In other words, unless the application is brought within 60 days from the signing or entry or pronouncing of the judgment sought to be appealed from, it cannot be entertained.

As far as I am aware, this is the first time that the question has been raised, although numerous applications have been heard and several have been allowed under almost precisely similar circumstances. And, unless it is plainly apparent that the provisions of the Act prohibit us from so doing, we ought to adhere to the practice which has prevailed up to this time. But, so far from it being apparent that the Court is without jurisdiction, the contrary appears to be the case. The power to act under sec. 71 is unquestionable in the ordinary case of a judgment pronounced by this Court upon an appeal in which the subject matter leaves no question as to the right to entertain it. And so when, under sec. 76 (g) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, this Court, in the exercise of its discretion, has allowed a further appeal to it from a Divisional Court.

Nor does there appear to be any good reason for treating differently a case in which, under sec. 76 a, leave has been given to appeal directly to this Court, instead of to a Divisional Court.

\* See *post*, p. 114.

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An order to that effect having been made, the case is in this Court in precisely the same position as if here under either of the other ways. It could have found its way here by means of the other channels, and, being here, is dealt with as any other case properly before the Court.

Sub-head (e) of sec. 48 of the Supreme Court Act is intended to enable this Court to place any case in which it has given final judgment in the same position, as regards an appeal to the Supreme Court, as cases falling under sub-heads (a), (b), (c), and (d). When a case does not come within any of these four sub-heads, it only needs the application by the Court of the power given by the 5th sub-head to group it with them. There is nothing in sec. 48 imposing a time-limit within which the leave must be applied for or granted. For that, reference must be made to sec. 69, the effect of which, but for the proviso "except as otherwise provided," would probably be to compel the leave to be at least applied for within the 60 days. But then comes the power, not possessed by the Supreme Court, but given by sec. 71 to the Court appealed from, or to a Judge thereof, to allow an appeal although not brought within the 60 days. Again, there is no time-limit imposed, and it is left to the Court or Judge to be governed by such special circumstances as may be presented, having regard to what, in view of all the facts, including the lapse of time, may be fair and just to the respondent.

It follows from these conclusions that there is no obstruction to our entertaining the application in this case, even if it be out of time as suggested. The case came to this Court by way of appeal from a Divisional Court. The matter in controversy was the sum of \$1,000, exclusive of costs, and so fell within sub-head (b) of sec. 76 of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, and was, therefore, properly before this Court.

Unfortunately for the defendants, the Supreme Court has held that the matter in controversy on the appeal to that Court does not *exceed* \$1,000 exclusive of costs, and, therefore, it does not come under sub-head (c) of sec. 48 of the Supreme Court Act, and it is necessary to obtain leave under sub-head (e).

If this branch of the motion should be granted, there would be no difficulty in acting under sec. 71.

But, although I differed from the majority of the Court as

to the disposition of the appeal, I am unable to say, consistently with our decisions in other cases, that there are in this case any special reasons for treating it as exceptional, or any special circumstances which should take it out of the general rule that litigation in a case involving no more than the amount here involved should cease with the rendering of judgment in this Court.

As has been pointed out in other cases, the mere fact of a difference of opinion among the members of the Court is not, in itself, a sufficient reason: see *Lovell v. Lovell* (1907), 13 O.L.R. 587. And no other special circumstance that should weigh with us has been presented.

The application must, therefore, be refused.

OSLER, J.A.:—Leave to extend the time for bringing the appeal, as well as leave to appeal, the judgment being for \$1,000 only, is necessary to enable the defendants to go further, but there is even less reason for granting the application than there was in *Irving v. Grimsby Park Co.*\* There is nothing involved but the question whose negligence, his own or the defendants', caused the plaintiff's injury. That has been passed upon by the jury, by a Divisional Court, and by this Court, and the case is eminently one for the application of the rule *interest reipublicæ ut sit finis litium*.

I would dismiss the application.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—This is not as strong a case, in more than one respect, for granting leave to appeal, as the case of *Irving v. Grimsby Park Co.* is. But, having regard to all its circumstances: the differences of opinion among the Judges of the Court to be appealed from; the doubt as to a right of appeal, without leave, which existed, and the nearness to that right to which the case, as finally determined upon that question, comes; and especially the fact that the appeal has been brought and all the delay and expense of the appeal, substantially, gone to; I would grant the leave, and extend the time.

*Motion dismissed; MEREDITH, J.A., dissenting.*

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\* *Post*, p. 114.

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## [IN THE COURT OF APPEAL.]

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Feb. 11.

## IRVING V. GRIMSBY PARK CO.

*Supreme Court of Canada—Leave to Appeal to—Jurisdiction of Court of Appeal—Supreme Court Act, secs. 48 (e), 69, 71—Extension of Time for Appealing—Appeal Quashed in Supreme Court—Argument on Merits.*

The Court of Appeal has jurisdiction, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under sec. 71, to extend the time for appealing, even after the sixty days allowed by sec. 69 have expired.

The Court (MEREDITH, J.A., dissenting) refused leave to appeal from the judgment in 16 O.L.R. 386, after the time for appealing had long expired, notwithstanding that an appeal to the Supreme Court of Canada, launched without leave, had been argued in that Court upon the merits before being quashed for want of jurisdiction: see *Grimsby Park Co. v. Irving* (1908), 41 S.C.R. 35.

MOTION by the defendants, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 16 O.L.R. 386; and, under sec. 71 of the same Act, to extend the time for bringing the appeal.

The motion was made in circumstances similar to those existing in *Milligan v. Toronto R.W. Co.*, ante, p. 109.

The judgment of the Court of Appeal was given on the 24th March, 1908, dismissing (two of the five Judges composing the Court dissenting) an appeal from the judgment of Mulock, C.J.Ex.D., at the trial, in favour of the plaintiff.

The defendants lodged an appeal to the Supreme Court of Canada, but that Court, on the 15th December, 1908, quashed the appeal: *Grimsby Park Co. v. Irving*, 41 S.C.R. 35.

The present application was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 19th January, 1909.

G. F. Shepley, K.C., for the defendants.

G. H. Kilmer, K.C., for the plaintiff.

February 11. Moss, C.J.O.:—I have in the case of *Milligan v. Toronto R.W. Co.*\* dealt with the objection as to the want of power in the Court to entertain the motion.

\* Ante, p. 109.

After consideration, I am of opinion that the application should not be granted. The case came before this Court by way of appeal directly from the trial Judge's decision. That this was done *per incuriam* appears to follow from the subsequent action of the Supreme Court.

The plaintiff was not responsible for this, and should not be made to suffer for it. When the Supreme Court raised the objection, then was the defendants' opportunity to ask a suspension of action until application might be made to this Court under secs. 48 and 71 of the Supreme Court Act. But this course was not adopted. The consequence is, that to grant the application now would be to further delay the final disposition of the case until the May sittings of the Court.

Besides, the Supreme Court deprived the plaintiff of his costs of the abortive appeal. Yet it is now asked that he be compelled again to undergo further expense and submit to further delay.

Care should be taken not to respond too readily to the desire of defeated appellants to be permitted to carry on the litigation notwithstanding the general limitation prescribed by the statutes. Nor should we be too much influenced to assist the prolongation by the fact that, acting under a mistaken impression, the parties seeking leave have already incurred expense which will be thrown away. Perhaps, if the regular course had been adopted, both parties might have been spared much unnecessary expense.

The case being one in which an appeal does not lie as of right to the Supreme Court, the defendants have reached the ordinary limit. They might, and perhaps should, have first taken an appeal to a Divisional Court, but, whatever the result might have been there, the ultimate appeal was to this Court, according to the general rule.

Under the circumstances, I am disposed to let it rest there.

The motion must be refused.

OSLER, J.A.:—There can be no doubt, looking at the terms of sec. 71 of the Supreme Court Act, and the practice which has been constantly followed under that section and its predecessors, that, until the Supreme Court shall otherwise declare, this Court, or a Judge thereof, may allow an appeal to the Supreme Court although such appeal may not have been brought within the

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time prescribed by sec. 69, *i.e.*, within 60 days from the signing or entry or pronouncing of the judgment appealed from. Whether the time ought to be extended in any given case must depend upon its own peculiar circumstances.

So also, whether leave to appeal should be given, when that is necessary, under sec. 48 (e).

Where an extension of time to bring the appeal and also leave to appeal are requisite, it is probable that the motion or motions must be made to the Court of Appeal, as the Supreme Court has no authority to extend the time, nor can leave to appeal be given by a single Judge of the former Court.

Here both conditions are essential to the prosecution of the appeal, as it does not lie as of right under clauses (a), (b), (c), or (d) of sec. 48. It was brought without leave, and, after argument upon the merits as well as upon the point of jurisdiction, was quashed by the Supreme Court on the latter ground.

The time for bringing the appeal under sec. 69 has now long elapsed.

There is no suggestion, in the judgment of the Supreme Court, that it is a proper case for extending the time and giving leave to appeal, so that the case may be restored to the list and dealt with on the argument already before them. The appellants knew the situation as long ago as the 12th November, and might have made, but did not make, their application for relief during the last sittings of this Court. They apparently preferred to take their chances of a favourable decision on the point in the Supreme Court.

Under all the circumstances, I think that the plaintiff may well complain that we should be inflicting a great hardship upon him if we were now to interfere to prolong the litigation.

I would dismiss the application.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—This is an application for special leave to appeal, from this Court to the Supreme Court of Canada, under sec. 48 of the Supreme Court Act, R.S.C. 1906, ch. 139.

It is opposed upon two grounds: (1) that the application is too late; that this Court has not now any power to grant such leave;

and, if not, (2) that it is not a case in which that power should be exercised.

Although sec. 48 is altogether negative in construction, and was originally framed for the purpose of curtailing the power of the Supreme Court of Canada, there is no doubt that it now confers upon this Court, as well as upon the Supreme Court of Canada, independent power to grant leave to appeal from any of its judgments; and so the first question is reduced to this: whether, under sec. 69 of the Supreme Court Act, the time within which such power may be exercised is limited to 60 days, as therein provided; and, if so, whether sec. 71 of the same Act, in effect, permits an extension of the time, under special circumstances.

The original of sec. 48 was the provincial enactment 44 Vict. ch. 5, sec. 43 (O.), which had no legal effect, being beyond the power of the provincial Legislature; but, eventually—the Attorney-General for Ontario, by whom it was introduced, having become the Minister of Justice of Canada—effect was given to it by procuring its enactment by the Parliament of Canada: 60 & 61 Vict. ch. 34, sec. 1 (D.) It is remarkable that this enactment was not passed expressly as an amendment to the Supreme and Exchequer Courts Act, though it may be that the substantial effect of it was the same as if it had been; at all events, subsequently, in the revision of the statutes of Canada in 1906, it was made part of that enactment, and now is sec. 48 of the Supreme Court Act, and must be construed so as best to give effect to all the provisions of that Act.

Under sec. 69 of that Act, every appeal, except as in the Act otherwise provided, must be brought within 60 days. Although this enactment was passed, not only before the provincial enactment was given legal effect, but also before it was passed, yet it must, I think, be held to apply to an appeal by leave under sec. 48, that is, it must be held to apply to all appeals provided for in the Act, unless therein otherwise provided, and there is not, and never was, any exception of such an appeal as this otherwise provided. It could hardly have been meant to leave unlimited the time within which an appeal by special leave could be brought, whilst an appeal by higher right—by right of the Act of Parliament—was limited to 60 days.

But the section does not in fact apply to this case, because

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the appeal, in it, was brought within the time limited, and was duly carried on to hearing before any question was raised as to the need of leave. Neither the words nor the purpose of the section make it applicable. The purpose is to prevent delay; the words are, "every appeal shall be brought." This appeal was brought without delay, but it turns out that it needs special leave. Why may not special leave be now given? Nothing in the Act requires that it shall be given before any steps are taken in bringing the appeal; nothing requires that, if leave be now given, the appeal shall be brought anew, and that all that has since been done shall be thrown away. Much plainer words are required before such a harsh and needless—may I say senseless?—course of proceeding should be adopted.

If, however, this were not so, I can perceive no good reason why the time for appealing might not be extended under sec. 71 of the Supreme Court Act. It is, of course, obvious that this section, as originally enacted, was not intended to cover such a case as this, for such a case as this was not possible until the Act 60 & 61 Vict. ch. 34 (D.) was passed; but since that enactment, and especially since the consolidation of sec. 1 of it with the Supreme Court Act, a very different question is presented. It may well be that the power conferred by sec. 71 is a power to extend the time for appealing, and not a power to give leave to appeal in a case not appealable as of right; but when either Court has given leave under sec. 48, which I may again say is not limited as to time, why may not the Court appealed from, or a Judge thereof, extend the time within which such an appeal—which becomes an appeal of right when the leave is given—may be brought? And, if so, in such a case as this, the leave, in both respects, can, most conveniently and properly, be given in one order, when the leave to appeal is given by this Court. If leave to appeal were given by either Court within the 60 days, it could hardly be contended that subsequent delay in bringing it might not be absolved under sec. 71; and, if so, why not when the leave is given after the 60 days? there being no limit put upon the power to grant leave to appeal, which very obviously is quite a different thing from bringing an appeal. No one is bound to bring an appeal merely because he has obtained leave to appeal.

Then, having power to grant the leave, should it be granted?

When it is said that the appeal was taken with the concurrence of both parties; that they have gone to all the costs of an appeal fully brought; that that appeal has been fully argued upon its merits, and that upon that argument both parties contended for the right to have the appeal disposed of upon its merits, and urged that it should be so disposed of; that the case was so near to one in which there was an appeal as of right that an order of this Court, made by a single Judge, recited that it is so appealable, and that it was accordingly so heard and determined in this Court, and was so heard in the Supreme Court of Canada: it would surely be very much like a farce of the Gilbertian order to deny the parties that which they seek, upset the whole proceedings, waste a very great amount in costs, time, and trouble, and leave the question unsolved by the highest Court of Canada, though it affect many others than the plaintiff, and is one of very great importance to the defendants; and all merely for want of leave, which either Court had power to give. So that really the one thing standing in the way of a satisfactory and binding conclusion of the whole matter is the trouble its determination might give to the Judges who heard it, or an expression of that determination if already reached. It is right to look the actual facts in the face, and also to state them as they really are, for by that means a conclusion which to the lay mind would seem inexcusable, if not preposterous, is more likely to be avoided.

It was said that the Supreme Court of Canada has laid down some rule for the guidance of the provincial Court in granting leave to appeal to the former Court; but, of course, that could not be under the enactment in question, for that gives, as I have said, independent equal powers to each of the Courts, and there is no appeal from the one to the other, whether leave be granted or refused, though, when refused by the one, there does not seem to be anything to prevent an application to the other, however futile such an application might generally be.

It was said by Nesbitt, J., in the case of *Lake Erie and Detroit River R.W. Co. v. Marsh* (1904), 35 S.C.R. 197, at p. 199, that it may be impossible to lay down any general rules upon the subject; that it may be that each case ought to be dealt with upon its own circumstances; but I think it may be appropriately said that the enactment itself affords a safe guide: see *Lovell v. Lovell*

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(1907), 13 O.L.R. 587; and that we ought not to attempt to apply to an intermediate Court in this country the rules or practice applicable to an application to the Privy Council for leave to appeal to that tribunal. The rights and interests of the parties to the litigation should, in my opinion, be the paramount consideration in these lower Courts, which ought to be careful not to attempt to assume the mantle of the ultimate tribunal, to which different considerations may apply.

I adhere to the views expressed by me in the case of *Lovell v. Lovell*, 13 O.L.R. 587, upon this subject, and need not now repeat them.

In addition to such considerations, in this case the rights of every leaseholder under the appellants are affected, and will be substantially determined, for another action would be obviously futile, this Court would adhere to its opinion in this case, and refuse leave to appeal. It will not do to say that no harm will be done to the leaseholders for the decision is in their favour; for such success as the respondent has achieved in this case they may not desire; they may deem it more in their own interests that the control of the corporate body over its tenants should not be loosened; and, in any case, it is a most important, if not in some sense a vital, matter to the appellants.

It was said that in any case the appeal was not likely to succeed, but what have we to do with that? It is plainly not in any sense a frivolous one. But, if we were to guess as to the result of the appeal, why guess that the Supreme Court considered it a hopeless one? If so, is it not probable that they would, following their course in other cases, whether strictly accurate or not, have dismissed the appeal upon its merits at the argument, instead of leaving it in its present unhappy state of brought and argued, but undecided?

I would grant leave to appeal and extend the time. The case has been fully argued in the Supreme Court, and there is nothing more to be done before dismissing or allowing the appeal.

*Motion dismissed; MEREDITH, J.A., dissenting.*

E. B. B.

## [DIVISIONAL COURT.]

RE HAMILTON AND CANADIAN ORDER OF FORESTERS.

D. C.

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Jan. 18.

*Life Insurance*—"Legal Heirs"—*Wife and Children—Executor—Ontario Insurance Act—R.S.O. 1897, ch. 203, sec. 2, sub-sec. 23—7 Edw. VII. ch. 36, sec. 1 (O.).*

In a life insurance certificate of the Canadian Order of Foresters the money issued was expressed to be payable at the death of the insured to his "legal heirs":—

*Held*, that the money was payable to the widow and each of the eight children of the insured in equal shares, and not to his executors to be disposed of as part of his estate.

A LIFE insurance certificate for \$2,000 was issued by the high court of the Canadian Order of Foresters, on the 29th day of September, 1903, to one Alexander Hamilton, payable at his death to his "legal heirs," in pursuance of his application for membership. Alexander Hamilton died on the 9th day of May, 1908, leaving him surviving his widow and eight children, six of whom are infants, and without having designated any new beneficiaries to receive the moneys payable under said certificate. He left a will and codicil which does not in any way refer to this life insurance certificate or to any of his life insurance.

On an application made by the high court of the Canadian Order of Foresters to pay these moneys into Court, Teetzel, J., by an order dated November 6th, 1908, directed that the high court of the Canadian Order of Foresters pay these moneys into Court after deducting the costs of all parties, and further ordered that the determination of the question as to whether the moneys payable under this life insurance certificate belong personally to the legal heirs of the said Alexander Hamilton or to the estate of the said Alexander Hamilton to be disposed of under the provisions of his will, be referred to a Divisional Court of the High Court of Justice in and for the Province of Ontario.

In pursuance of this order the matter came on before a Divisional Court composed of BOYD, C., MACLAREN, J.A., and BRITTON, J., on January 18th, 1909.

*Lyman Lee*, for the Official Guardian, contended that the widow and each of the eight children of the deceased were entitled to a



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one-ninth share in these moneys under the terms of the certificate and under the definition of "legal heirs" contained in the Ontario Insurance Act, being R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, as amended by 7 Edw. VII. ch. 36, sec. 1 (O.).

*S. H. Bradford*, K.C., on behalf of the Toronto General Trusts Corporation, the executors under the will and codicil of the deceased, and of two infant residuary legatees, contended that these moneys should be paid to the executors and be disposed of as part of the estate: *Re Duncombe* (1902), 3 O.L.R. 510.

PER CURIAM:—The moneys payable under this certificate belong to the "legal heirs" personally; the widow and each of the eight children are entitled to a one-ninth share in same. Costs of all parties out of the fund.

A. H. F. L.

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[MEREDITH, C.J.C.P.]

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RE BOWERMAN AND HUNTER.

Feb. 3.

*Devolution of Estates Act—Registration of Caution after Expiry of Three Years—Approval of Official Guardian—Vested Interest of Infant in Land Devolving—Construction of secs. 14, 15, 16—Revesting in Personal Representative—Sale with Approval of Guardian.*

Sections 14 and 15 of the Devolution of Estates Act, R.S.O. 1897, ch. 127, as amended by 2 Edw. VII. ch. 17, apply where the interests of infants as well as those of adults are to be affected; and where, upon an intestacy, land has vested in an adult and an infant (the heirs of the intestate), after three years from the death of the intestate, the land not having been disposed of or conveyed by the administrator, and no caution having been registered, within that period, a caution may be registered, under sec. 14, after the expiry of that period, upon the certificate of the official guardian approving of and authorising the caution to be registered being given and registered with the caution; and the effect, under sec. 15, is to re-vest the land in the administrator, just as it would have been or remained vested if the caution had been registered within the three years; and the administrator, with the consent of the official guardian, acting on behalf of the infants, may then sell and convey as provided in sec. 16.

CASE stated for the opinion of Court, under the Vendors and Purchasers Act, as follows:—

"Certain objections to the title were made under the contract of sale dated the 9th December, 1908, between L. H. Bowerman, as vendor, and Mary Ann Hunter, as purchaser, all of which have

been satisfactorily disposed of except the following, and, in order to narrow the point to be decided, a stated case has been agreed on as to the facts which give rise to the point in dispute.

"Mary Elizabeth Lee acquired an estate in fee simple by purchase of lot 38, plan 516, Wallace avenue, Toronto, on the 5th May, 1890, and died intestate on the 24th October, 1904, leaving her surviving her husband, Frederick William Lee, and one infant child, Mary Helen N. Lee, without having sold or disposed of said lands. On 5th December, 1904, letters of administration were granted by the Surrogate Court of the county of York to Frederick William Lee, husband.

"The said administrator, Frederick William Lee, filed a caution under the Devolution of Estates Act more than three years after the decease of the said intestate, Mary Elizabeth Lee. It is admitted that the administrator, pursuant to the provisions of the said statute, obtained the consent in writing of the adult beneficiary of the estate of the said Mary Elizabeth Lee before filing the said caution.

"Subsequently the said administrator sold and conveyed the said lot 38, plan 516, Wallace avenue, Toronto, to the vendor, with the concurrence and consent of the official guardian, on behalf of the infant Mary Helen N. Lee, which consent is evidenced by the official guardian indorsing his consent to the said conveyance in the usual way.

"The vendor asserts and the purchaser denies that the said conveyance by the administrator, with the concurrence and consent of the official guardian, on behalf of said infant, is sufficient to convey the said infant's interest in the lands of her mother, the intestate.

"The opinion of this Court is requested on the above."

The case was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 3rd February, 1909.

*A. C. Heighington*, for the purchaser. There is an infant, and her share vested at the expiration of three years. The Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 14, allows the administrator to register a caution after three years,\* but provides that he shall

\* Section 13 of the Act, as amended by 2 Edw. VII. ch. 17, sec. 3, provides: "Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within three years

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register therewith an affidavit shewing that it is necessary to sell, etc., and the consent in writing of *any* adult devisees or heirs. "Any" must mean "all." Then, in the absence *and* in lieu of *such* consent," the administrator may obtain an order of a Judge or the approving certificate of the official guardian. Even if "and" is to be read as "or," the statute has not been complied with. The official guardian's power to consent to the registration of a caution is *not* given to him in his capacity of guardian of infants or on their behalf, but is exercisable only in the absence or in lieu of the consent of the adult heirs. See Armour on Titles, 3rd ed., p. 344 *et seq.*; also the following passages from Armour on The Devolution of Land: "The provision for obtaining a consent implies a capacity in the heir or devisee to give the consent; and therefore infants and persons of unsound mind are not within the effect of this clause, and no subsequent caution could be obtained as against their interests:" p. 155. "If this reasoning is sound, it follows that no order can be made when the heir or devisee is an infant or of unsound mind. The official guardian does not act under this clause for or on behalf of infants, but as a substitute for a Judge, and only where adult heirs or devisees do not consent. It is true that by sec. 16 the official guardian is given power to approve, on behalf of infants and lunatics, of sales by executors and administrators—but only of the sales of land vested in the executors or administrators under the Act. And where the land has passed from the executors or administrators to an infant or lunatic, there seems to be no way of revesting it in the personal representative:" p. 156. It is only on default of obtaining the consent that the official guardian is brought in. In the circumstances of this case, no caution can legally be registered, and the land still remains vested in the adult heir and the infant. The adult heir in this case is the administrator; his conveyance alone, even with the consent of the official guardian, does not convey the vested estate of the infant. After the estate is vested in the infant, it can be revested in the administrator only by force of some statutory provision; and there is no such provision.

after the death of the testator or intestate, shall . . . be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto," etc.

The following sections of the Act as they appear in the revised statute are set out in the judgment; but by the Act of 2 Edw. VII. they are amended so as to accord with sec. 13 as to the period of time referred to in them, the effect of the amendment being to substitute "three years" for "twelve months."

Even if the land were vested again in the administrator, the official guardian would have no power to act, as his authority under sec. 8 of the Act is only in cases where, but for the preceding sections, the land would have vested at once in the infant heirs. The preceding section vesting the property in the administrator is sec. 4, and the official guardian's authority is limited to those cases in which the vesting in the administrator takes place by force of that section, because the section allowing the registration of a caution after the lapse of three years is a subsequent one, 14, and no power is conferred on the official guardian to consent to sales of such land, even if a caution could be registered in the case of infant's land, and if the effect of that would be to vest the land again in the administrator. No caution can be registered after the lapse of three years where infants are concerned. It is a well-known rule of construction that where an estate has vested, it can be divested only by clear words; the statute is not so clear and specific as to take away vested rights.

*W. J. Clark*, for the vendor. The meaning of secs. 13, 14, and 15 of the Devolution of Estates Act is plain, and the words used are unambiguous. Although there is no provision in sec. 14 specifically requiring the consent of any person on behalf of the infants, the section is unintelligible if it does not apply to infants. If it was only intended to apply to adults, secs. 15 and 16 are unnecessary. The words of sec. 15 (as amended), "In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within the proper time from the death of the testator," make the meaning clear and distinct, and the words are incapable of any construction but that contended for on behalf of the vendor.

*M. C. Cameron*, for the official guardian. The adults are the only persons who would be really interested in preventing the registration of the caution, because an infant cannot deal with his property, and the statute affords ample means of protecting the interests of the infant.

MEREDITH, C.J. (at the close of the argument):—With all respect for Mr. Armour's opinion, I think it is plain that the objections of the purchaser are not entitled to prevail, and that a good title can be made.

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The scheme of the Devolution of Estates Act, R.S.O. 1897, ch. 127, is that land shall devolve upon the personal representative in the same way as personal property does, but that at the expiration of twelve months from the death of the testator or intestate, unless a caution is in the meantime registered, the land shall vest in the persons beneficially entitled to it. The caution remains in force for twelve months, but may be renewed from time to time. This period of one year was by subsequent legislation\* extended to three years.

It was found that the object of the Act, which was in part at least to render unnecessary the expense of administering an estate in Court, was frequently frustrated owing to the neglect of the personal representative to register or to re-register the caution in time, and an amendment was therefore introduced by which it is provided that where the personal representative, by oversight or otherwise, has omitted to register or to re-register a caution in due time, he may, subject to the provisions which are contained in what is now sec. 14 of the Revised Statute, register it.

Section 14 provides that "where executors or administrators have, through oversight or otherwise, omitted to register a caution within twelve months after the death of the testator or intestate, as provided by the preceding section, or have omitted to re-register a caution as required by the said section, they may register the caution in either case notwithstanding the lapse of the twelve months respectively provided for the said purposes, provided they register therewith:—

"1. The affidavit of verification therein mentioned;

"2. A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be), under their powers and in fulfilment of their duties in that behalf;

"3. The consent in writing of any adult devisees or heirs whose property or interest would be affected; and

"4. An affidavit verifying such consent; or

"5. In the absence and in lieu of such consent, an order signed by a High Court Judge or county court Judge, or the certificate

\* See 2 Edw. VII. ch. 17, secs. 3, 4, 10, 11.

of the official guardian approving of and authorising the caution to be registered, which order or certificate the Judge or official guardian may make . . .”

Section 15 deals with the effect of the caution:—

“15. In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within twelve months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators.”

Section 16 gives to the executors or administrators in whom the estate is vested as full power to sell and convey “for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether there are debts or not, as they have in regard to personal estate,” subject to a proviso that where infants or lunatics are beneficially entitled to the estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts, the sale shall not be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian.

Two objections to the title are made:—

First, it is said that these provisions are applicable only where the devisees or heirs whose interests are to be affected are all adults.

Second, that the land having become vested in the heirs owing to the failure to register the caution, there is nothing to divest the estate or take it out of them and to transfer it to the executors.

I think neither objection is entitled to prevail.

The object of the legislation is manifest, and the language used is, in my opinion, sufficient to give effect to that object.

The third pre-requisite to the right to register the caution is “the consent in writing of *any* adult devisees or heirs whose property or interest would be affected,” plainly meaning, I think, the consent in writing of such of the devisees or heirs whose property or interest

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would be affected as are adults. As Mr. Cameron pointed out, they are the only persons who would be really interested in preventing the registration of the caution, because an infant cannot deal with his property, and there are ample means of protecting the interests of the infant provided by the subsequent sections of the Act requiring the intervention of the guardian before a sale effectual to bind his interest can be made.

Then the Legislature has thought that it might not be reasonable to require that there should be the consent of the adult devisees or heirs, and therefore provision is made that where they do not consent, an order signed by a High Court Judge or a county court Judge, or the certificate of the official guardian approving of and authorising the caution to be registered, may be registered in lieu of the consent provided for by clause 3.

This case, in my opinion, comes within the very words of the section, and the caution was therefore properly registered.

I have no more doubt as to the meaning of sec. 15: "In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within twelve months from the death of the testator or intestate . . ." That language, I think, plainly means that the effect is to be to re-vest the land in the personal representative just as it would have been vested, or remained vested, which perhaps would be more accurate, if the caution had been registered within the twelve months. If the caution had been registered in due time, the land would have remained vested in the personal representative, and the registration of the caution under sec. 14 cannot have the same effect as the registration of a caution in due time, unless it is given the effect I have mentioned, or unless, by the *ex post facto* operation of sec. 16, the statutory vesting in the beneficiaries is to be treated as if it had not taken place; and *quâcunque viâ* the same result is reached.

If anything be necessary to shew that that is what was intended, the words which follow shew it—"save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them"—words which would be senseless unless the effect of the registration of the caution was to re-vest the land in the personal representatives, and they prevent the registration of the caution from having the

effect of re-vesting the shares of beneficiaries which had been transferred for valuable consideration to other persons.

Then by sec. 16, the executors and administrators, in whom the real estate is vested under the Act, are deemed to have full power to sell and convey the real estate.

I am unable to agree with the view to the contrary contended for by Mr. Heighington and supported by the opinion of Mr. Armour which he cited. It may be that the statute is not well drawn, but the language used presents no difficulty in the way of giving effect to what is the very plain intention of the provisions I have had to construe.

The result is that there will be a declaration that, in the circumstances of this case, the personal representative, with the consent of the official guardian acting on behalf of infants, may exercise the powers conferred by sec. 16 of the Act.

I suppose, as this may be treated as a test case, it would not be reasonable to make Mr. Heighington's client pay the costs.

E. B. B.

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[IN THE COURT OF APPEAL.]

RE THE ANCIENT ORDER OF UNITED WORKMEN AND  
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*Death—Presumption of—Life Policy—Absence for Over Seven Years—*  
7 Edw. VII. ch. 36, sec. 3 (O.).

April 23.  
May 18.

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In order to establish the presumption of the death of the claimant's husband, on account of his not having been heard of for seven years, it was proved that in May, 1900, he had gone in a sail-boat to an island adjacent to where he lived to procure some lumber to be used in his business, and that while on this island a violent storm having arisen, he had telephoned his wife that he would probably be detained. He did not, however, return, and his wife had not heard of him since. The boat was subsequently found with the sail set and having some lumber and his cap in it. On the following morning he was supposed to have been seen at the railway station, but the person who thought he saw him would not swear to his identity. It was said that a person who had lost some chairs suspected him of having stolen them, but it did not appear that he knew that he was suspected, while it appears that the detectives suspected someone else. In 1901 a letter was received from a favourite aunt in England, with whom he was in the habit of corresponding, asking about him, and stating that she had not heard from him for some time past. On the case coming before the Court of Appeal, the giving of judgment was stayed, at the claimant's request, to enable her to furnish an affidavit from the aunt verifying her letter:—

*Held*, affirming the judgment of the Divisional Court, reversing the judgment of Riddell, J., that there was sufficient evidence to raise the presumption of death, even without the affidavit subsequently furnished.

[MEREDITH, J.A., dissenting on the question of the need of the further evidence.]



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THIS was an appeal from the judgment of the Divisional Court reversing the judgment of RIDDELL, J.

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A motion was made, on behalf of the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario, for an order declaring whether Frederick C. Marshall, to whom the Grand Lodge had issued a beneficiary certificate, No. 40881, was to be presumed dead on account of not having been heard of for a period of seven years, so that payment should be made to his alleged widow, Mary Ann Marshall, to the amount of \$2,000, secured by the said certificate, which she claimed she was entitled to.

On April 13, 1908, the motion was heard before RIDDELL, J., sitting in Chambers.

A. G. F. Lawrence, for the Grand Lodge.

J. M. Godfrey and W. A. Henderson, for the claimant, Mary Ann Marshall.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

April 23. RIDDELL, J.:—This is an application of the same character and made on the same day as *Re Dancey and Ancient Order of United Workmen* (1908), 11 O.W.R. 833. I was asked to hold the case until further inquiry should be made. This has now been done, and I proceed to dispose of the application.

Frederick Charles Marshall, on or about the 17th May, 1900, left the city of Kingston in a small sail boat for Garden Island, for the purpose, it is said, of procuring some timber to be used in his business—a furniture and upholstering business. He had then been married about sixteen years, but had no issue. His people lived in England, and he had an aunt there, with whom he corresponded; but he lived in Kingston with his wife, with whom his relations seem to have been amicable. He rented the boat, and said he intended to do a job of repairing for one F., on the island. That evening he telephoned his wife that he could not leave just then, that he would be home shortly and as soon as he could leave, it was a terrible storm, and he could not leave on account of the storm. He did leave the island in the boat—

a sail boat—while the storm was still severe; but did not arrive home. The following morning early, an employee of the Grand Trunk Railway, named Kimpson, saw a man whom he believed to be Marshall (though he would not take his oath that it was he) get on the train going east at 1.20 a.m. At the time Kimpson remarked to one Filbert that he thought that was Marshall getting on the train.

Marshall had some little time before been suspected of taking a number of chairs belonging to one Harrison, and shortly thereafter the building in which the chairs had been kept was burned without any known cause. Marshall knew that he was suspected of stealing the chairs, and it is certain that he was suspected of burning the building, though it does not appear that he was aware of such suspicion.

On or about the 18th May one George Sudds, a sailor, found on Lake Ontario a small sail boat, with sail set and having within it a cap belonging to Marshall and two or three pieces of hardwood lumber. The sailor hauled the boat up on Simcoe Island, near Garden Island. It would seem to be admitted that this was the boat in which Marshall had set sail.

Marshall had often been at Garden Island in the same way before, and it was alleged, upon the argument, that he was a competent sailor.

No information has been received by his wife from him or of him since the 17th of May, 1900; and a letter is produced from the aunt with whom it is said he was used to correspond. This letter is dated October 30th, 1901, and says, "It's years since I heard of him." A rumour seems to have been current at one time that he had been recognized at St. Louis. Beyond having her brother and another man go over to Garden Island to find out when her husband left, and the one letter written in 1901 to the aunt, the widow has made no effort to trace her husband. It must, in fairness, be said that her means are narrow, and she says she did not hear of the rumours. But no affidavit is produced from the aunt or from any of his people in England, and not even any inquiry seems to have been made in England for seven years. If Marshall had desired to make a disappearance, all the circumstances are consistent with his having gone to England. We have no affidavit that he did not. And it can-

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not, to my mind, be considered that it is proved that he has not been heard of for seven years, where there is no evidence that the person with whom he admittedly corresponded has not been in communication with him. Following the case of *Dancey*, I think, I must declare that the presumption of death has not been established, and the same order will be made as in that case, except that the Society will have their costs, if demanded.

From this judgment the claimant, Mary Ann Marshall, appealed to the Divisional Court.

On May 18, 1908, the appeal was heard before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

*T. N. Phelan*, for the appellant.

*A. G. F. Lawrence*, for the respondent.

At the conclusion of the argument judgment was delivered by MEREDITH, C.J.C.B.

MEREDITH, C.J.:—In this case, if the question were whether, upon the evidence, it is proved that Marshall, the insured, is dead, I should be prepared to come to the conclusion that there is affirmative evidence that he was drowned on the night of the 17th May, 1900.

He was in the furniture business, and the evidence shews that he went to Garden Island, on that day, to get hardwood lumber for the purpose of his business. There is evidence that he telephoned his wife from the island on that day or evening, saying he was delayed in returning on account of a storm, but that he would return that night. There is also the testimony of a man named Ferguson that the insured hired a sail boat that night and started for Kingston. There is also evidence that the next day a man named Sudds found a boat with nobody in it, and the sail set; and the testimony of Clark, a brother-in-law of Marshall, that he saw the boat, and in it was a cap, which he recognized as one Marshall was in the habit of wearing; and there is the further evidence that in the boat were the pieces of hardwood lumber which Marshall was bringing over from Garden Island to Kingston.

Marshall never returned home, and his wife has never heard from him since.

There is, so far as I can see, not the slightest reason why, if living, he would not have communicated with his wife. They appear to have lived on good terms, and there was no intention expressed to the wife that he would go away without returning.

It is said, however, that proper inquiries have not been made for him. Communications have been had with a favourite aunt of his, to whom, if he had gone to England, it was thought he would be likely to have first made his way. The aunt replied that she had not seen or heard of him. Her letter is dated in October, 1901—fifteen or sixteen months after the man disappeared.

The learned Judge seems to have thought an affidavit from the aunt was necessary. I do not think that is so. I think that information obtained by inquiry is sufficient for the purposes of an application of this kind. Perhaps in some cases it would be better, and in some cases it might be requisite that there should be an affidavit; but here there is nothing to suggest any dishonesty on the part of this lady in England, and there is no reason why she should do anything improper, and her letter is produced. I think that answered any requirement there was of getting information from any persons with whom, if living, Marshall would probably have been in communication.

Then, it is said that there is no evidence as to what relatives he had in England or as to any information being sought from them.

I think it would be asking altogether too much, in a case such as this, of a man who, according to a letter which is now filed, had not for nearly thirty years been in communication with his relatives in England, to require that there should be information got from them. To lay down any such rule, I think, would be to overload with altogether too much expense applications of this kind, and practically would be a denial of justice.

Then, on the other hand, all that there is is the affidavit of a man named Kimpson, who apparently thought he saw Marshall boarding an outgoing railway train on the night of his disappearance; but he very frankly says: "I would not say that it was Marshall I saw that night boarding a train at Kingston. I saw a man, but did not see his face, nor hear his voice, although I spoke to him. There was noise of trains. I will not pretend to say that it was Marshall."

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Then there was a man named Harrison, who appears to have suspected that Marshall had stolen or dishonestly appropriated his furniture. It does not appear that the fact that Marshall was suspected was communicated to him, and, as far as I can gather, the detectives who had charge of the case suspected somebody else, not Marshall. Then it is said that there was an article in the *Whig* newspaper, which spoke of the probability of the suspected person being soon arrested. What does that amount to, unless there was something to indicate that Marshall knew that he was the person suspected?

The fact is that the man was going about his legitimate business in getting the wood from Garden Island.

It seems to me that there is ample evidence to support the presumption that he is dead.

No costs here or below to either party. Mrs. Marshall might have gone on and sued them for the money, and they would have defended at their peril. No doubt they have to run some risk in these cases, although I think there is practically none in this case.

From this judgment the Grand Lodge appealed to the Court of Appeal.

On September 24, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

A. G. F. Lawrence, for the appellants. The question here is whether sufficient evidence has been furnished on the part of the claimant to satisfy the Court of the presumption of Marshall's death. The circumstances under which Marshall disappeared would rebut the presumption of death. There is the fact of the boat having its sail set and not capsized. There is the evidence of the person, who claims to have seen him at the railway station. There is the allegation of the theft of the chairs; this in itself would be sufficient to account for his disappearance, for if the charge were true it is not probable that he would let his whereabouts be known. The necessary steps also have not been taken to disprove the fact of his being alive. Affidavits should have been procured from members of the family, whom he might be likely to visit, as to whether they had seen him or not, or knew anything of his existence. Any slight evidence will rebut the presumption: *Doyle v. City of Glasgow Life*

*Assurance Co.* (1884), 53 L.J.N.S. Ch. 527; *Watson v. England* (1844), 14 Sim. 28; *Bowden v. Henderson* (1854), 2 Sm. & G. 360; *Re Creed* (1852), 1 Drew. 235; *Re Mileham's Trusts* (1852), 15 Beav. 507; *Roderick v. Supreme Tent of the Knights of Macabees* (1903), 2 O.W.R. 493. It was very extraordinary that no claim has ever been made during all these years, although the claimant was a poor woman and had to pay the premiums of insurance.

*T. N. Phelan*, for the respondent. The question here is whether the evidence produced is sufficient to raise the presumption of Marshall's death, by reason of his not having been heard of for over seven years. There is the fact of his going to Garden Island; his attempted return in the sail boat on a stormy night; his non-return, and the subsequent finding of the boat with his cap in it, and no trace of him ever since. There is nothing in the fact of the boat not being capsized, and having its sail set, as it is quite consistent with this in the attempt to take down the sail he was thrown overboard. Then there is the letter from his favourite aunt in England, whom he would most probably have visited had he gone to England, stating that she had heard nothing of him. The only evidence against this is the supposed recognition of him at the railway station; but the party who thought he saw him would not swear to his identity, and there was nothing to substantiate the alleged grounds of suspicion that he had stolen the chairs: *Re Benjamin*, [1902] 1 Ch. 723; *Neepan v. Doe d. Knight* (1837), 2 M. & W. 894; *Hickman v. Upsall* (1876), 4 Ch.D. 144; *Re Lewes' Trusts* (1871), L.R. 6 Ch. App. 356; *Re Phene's Trusts* (1869), L.R. 5 Ch. App. 139; *Doe d. Lloyd v. Deakin* (1820), 4 B. & Al. 433. If, however, the Court desires it, the respondents are prepared to furnish an affidavit from the aunt in England verifying the contents of her letter.

January 19. Moss, C.J.O.:—Appeal by the Ancient Order of United Workmen from a judgment of a Divisional Court reversing a judgment of Riddell, J., upon an application made, on behalf of the appellants, under sec. 148 of R.S.O. 1897, ch. 203, as amended by 7 Edw. VII. ch. 36, sec. 3 (O.).

The Grand Lodge of the Ancient Order of United Workmen had issued a beneficiary certificate to one Frederick C. Marshall, conditioned upon his death to pay to Mary Ann Marshall, his wife, the sum of \$2,000.

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Frederick C. Marshall disappeared on the 17th of May, 1900, and has not been since heard of, and the application was for a declaration as to the presumption of his death. Riddell, J., was of the opinion that the presumption of death had not been established. But, upon appeal, the Divisional Court was of the contrary opinion, and pronounced the order now appealed from.

As part of the evidence going to prove that nothing had been heard of Frederick C. Marshall from the date of his disappearance was a letter from an aunt, with whom, it was said, he was a favourite and used to correspond. Riddell, J., commented upon the fact that no affidavit from this lady was produced, and, on the argument of the appeal, much stress was laid by counsel for the appellants on the omission to supply such an affidavit.

At the conclusion of the argument, counsel for Mrs. Marshall, while not conceding that an affidavit was necessary, asked permission to supply it, and time was given for that purpose. An affidavit from her is now produced, but, beyond verifying the fact that she wrote the letter in question, very little further information is contained in it.

It is true that, upon this application under the Act, the question to be determined is not whether Frederick C. Marshall was drowned on the 17th of May, 1900. If that were the question, there seems to be evidence quite sufficient to justify a jury in finding that he actually perished by drowning on that day.

But the question is whether in this proceeding enough has been shewn to raise the presumption—he not having been heard of for a period of seven years and over—that he is now dead. The view of the Divisional Court is that there was ample evidence to support the presumption that he is dead, and that, under the circumstances disclosed, there was no absolute need for an affidavit from the aunt; that the information contained in a letter received in response to inquiries made was evidence—though, of course, not strict proof—and might be acted upon in connection with the other evidence, there being no suggestion of dishonesty or improper conduct on the part of the writer or the person producing it.

It is suggested that there were reasons why Marshall should have thought it desirable to leave home and conceal his whereabouts, but this is not justified by what is shewn upon the material

before the Court. So far as appears, he was not involved in debt or any business difficulty that could furnish a reasonable motive for abandoning his home and concealing himself from his wife and relatives.

The judgment of the Divisional Court might well be supported without the aid of the additional affidavit. The appellants have now, however, the benefit of the oath of the writer of the letter verifying the fact of her having written it and the truth of the statements it contains. There is now no good reason why the amount of the certificate should not be dealt with as directed by the order of the Divisional Court.

The appeal should be dismissed with costs, but not of the additional affidavit.

OSLER, J.A.:—I agree with the reasons given by Meredith, C.J., in the Divisional Court, and would dismiss the appeal with costs.

MEREDITH, J.A.:—There are two quite distinct questions arising upon the facts of this case, and it is very important to bear that clearly in mind in considering it, for, as to one of them, there is jurisdiction upon such an application as this, whilst as to the other there is not. The one question is whether the insured ought "to be presumed to be dead on account of not having been heard of for a period of seven years;" the other question is whether the insured has, in fact, been proved to be dead. The former question is one which may be determined upon a summary application such as this: 7 Edw. VII. ch. 36, sec. 3 (O.); the other must be tried in the ordinary manner. We cannot, therefore, affirm the order in appeal, because the insured may have been proved to have been drowned; nor can we properly consider any such question in any such proceeding as this. If this appeal is to be dismissed, it can be only because it has been proved to be a proper one in which to apply the presumption before mentioned. That presumption arises when a person has not been heard of for seven years by those who, if he were alive, would be likely to hear of him. We are, therefore, to assume the fact of his being alive, and then ascertain, as well as possible, who they are who would be likely to hear of him. In the facts of this case, it is unlikely that his wife would be one, for, if alive, he

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must have deserted her. Those who would be likely to hear from him are his relatives, but there is no sort of satisfactory evidence whether they have or have not heard of him at any time during the seven years. That which the insurance company asks seems to me most reasonable—namely, an affidavit shewing that some reasonable inquiry has been made among his nearer relations, and that the result of such inquiries proves that he has not been heard of since his disappearance at Kingston in May, 1900. The respondent cannot, with very good grace, object to furnish such evidence, seeing that she has been for eight years paying the premiums, under the contract of insurance, on the basis, if not in the belief, that the man was alive. Again, I point out that no relief can be given to her here on the ground that the fact of the death of the insured has been proved, apart from proof by the presumption from absence. If she prefers to rely upon that, instead of giving the reasonable proof before mentioned, she can and must bring her action to enforce her claim in the usual way.

No objection is made to the respondent having further time to supply the needed evidence as to the presumption of death; and, therefore, if that proof be furnished within a reasonable time, this appeal should be dismissed without costs; otherwise allowed, and the order in question discharged, with costs.

Since the argument of this case, when the foregoing views were expressed and put in writing, the respondent has put in further proof, which, though not as satisfactory as one might well desire, is now considered sufficient, and so the appeal may rightly be dismissed; but I am unable to find any sufficient reason for making the appellant, who has been in the right in demanding better proof, and who, by the direction of this Court, has been given better proof, pay the costs of the appeal.

GARROW and MACLAREN, JJ.A., concurred.

G. F. H.

## [IN THE COURT OF APPEAL.]

## SUTHERLAND V. THE GRAND TRUNK RAILWAY COMPANY.

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*Railways—Live Stock Contract—Restriction of Liability—Contract Made in the United States for Transit of Stock to Canada—Provisions of Contract Similar to Those Approved by Railway Board—Validity of Contract—Railway Act, R.S.C. 1906, ch. 37, secs. 284 (7), 340.*

The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway on its own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company was entitled to charge, liability was to be limited to an amount not exceeding \$100 for each animal, or a total liability not exceeding \$1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37. The horses were carried by the contracting railway as far as its line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—

*Held*, that by the terms of the contract it applied not only to the railway company with which it was made, but with the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved.

THIS was an appeal from the judgment in favour of the plaintiff at the trial.

The action was tried before FALCONBRIDGE, C.J.K.B., at St. Catharines, on April 6 and 7, 1908.

*E. A. Lancaster*, K.C., and *J. H. Campbell*, for the plaintiff.

*G. F. Shepley*, K.C., and *M. E. Foster*, for the defendants.

The facts are fully set out in the judgments.

At the close of the case the learned Chief Justice delivered the following judgment.

April 27. FALCONBRIDGE, C. J.:—This is an action brought by the plaintiff against the Grand Trunk R.W. Co. for the loss

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of some and damage to others of 15 very valuable horses, which were shipped about the 6th of October, by the plaintiff, on the New York, New Haven and Hartford Railway, consigned to himself at Grimsby, Ontario.

The course of the journey was that the New York, New Haven and Hartford R.W. Co. carried the horses to a certain point, where they were received by the Central Vermont R.W. Co., and then delivered to these defendants.

The plaintiff signed the contract, which is known as a live stock contract, a very long and carefully drawn document, and the main point to be decided in this case is whether this plaintiff is bound to accept the value of \$100 per animal provided in that contract, or whether he is entitled to recover for the whole value of the animals.

I find he has well proved the value of his horses upon incontestible and uncontradicted evidence. If he can go beyond the \$100 per animal, he is entitled to recover all he claims—namely, the sum of \$16,000—but the difficulty is whether he can, in the face of this contract, so recover.

I had a view upon the case when it was argued, and I only reserved judgment for the purpose of considering the numerous cases which were cited in the course of the very able argument, beginning, I think, with *Hall v. North-Eastern R.W. Co.*, L. R. 10 Q.B. 437, decided in England in 1875, and *Mayor, etc., of Hastings v. South-Eastern R. W. Co.*, 6 Q. B. D. 586, decided in 1880, and so on down almost to yesterday.

I have come to the conclusion that the plaintiff is bound by the \$100 *per* horse, which he contracted as being the value. He did that by a solemn contract, in the course of which he stated, “upon the following terms and conditions which are admitted and accepted by the shipper as just and reasonable,” and he acknowledges—it may or may not be true—he acknowledges under his own signature that he had “the option of shipping the above described stock at a higher rate of freight according to the official tariff classifications and rules of the said carrier and connecting carriers, and thereby securing the security of the liability of the said carrier and connecting railroads or transportation companies as common carriers.” He signs that contract, and, unfortunately, the horses are destroyed or seriously injured by the admitted negligence of the Grand Trunk R.W. Co.

The Grand Trunk R.W. Co., of course, was no party to the making of this original contract, which is only between the plaintiff and the New York, New Haven and Hartford R.W. Co. It was a through contract over the New York, New Haven and Hartford Railway and the connecting lines. The goods were handed to these defendants upon the face of that contract and bills of lading in pursuance of it; the plaintiff chose to attach that value to his horses, and that value is attached with reference to any carrier in the chain.

The only serious question, then, that arises is whether this contract is authorized by the Board of Railway Commissioners, or whether it needs authorization. The general provision of the law is contained in sec. 340 of the Railway Act: "That no contract, condition," and so on, "impairing or restricting or limiting the carrier's liability shall relieve the company from such liability, unless such class of contract, condition, by-law," and so on, "shall have been first authorized or approved by order or regulation of the board." The Board of Railway Commissioners for Canada, at a meeting held on Wednesday, the 17th of October, 1904, on the application of the Grand Trunk Railway and other railways, made an order permitting those railways to continue the use of their present forms until the board should otherwise prescribe and order; and the form is annexed, which I consider to be for the purposes of this action of the class, and therefore the defendant company are entitled to set up the contract.

The judgment accordingly can be for only the \$1,200, which is to include any amounts paid into Court.

From this judgment the plaintiff appealed to the Court of Appeal.

On November 18th, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*E. D. Armour*, K.C., and *J. H. Campbell*, for the appellants. The contract in question here is not binding on the plaintiff, so far as these defendants are concerned. It was for the carriage of the stock over the New York, New Haven and Hartford railway so far

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as that railway extended, and must be limited to that line: *Parker v. Grand Trunk R.W. Co.* (1904), 3 O.W.R. 651; *Corby v. Grand Trunk R.W. Co.* (1905), 6 O.W.R. 81, 492. When the goods were delivered to the Grand Trunk Railway Company they should, if they desired to protect themselves, have made a special contract with the plaintiff. Under sec. 275 of the Railway Act of 1903, 3 Edw. VII. ch. 58, now sec. 340 of the R.S.C., 1906, ch. 37, all contracts of this kind must be approved of by the railway board, and without such approval cannot be enforced. A contract illegal by our law cannot be enforced, though legal, by the laws of a foreign country: *Rousillon v. Rousillon* (1880), 14 Ch.D. 351; *Re Missouri Steamship Co.* (1888), 42 Ch.D. 321. The English Act is somewhat different from ours. Under that Act no restriction is valid where the loss is occasioned by negligence: *Cohen v. South Eastern R.W. Co.* (1876), 1 Ex.D. 217, (1877), 2 Ex.D. 253. See also *Hughes v. Pennsylvania R.W. Co.* (1902), 202 Penn. St. R. 222, as to the law in force in Pennsylvania. The contract here has never been approved of by the board. The fact that it is in many respects similar to the contract produced, being the contract approved of by the board for use in Canada, is not sufficient. The contract itself must be submitted to and approved of by the board. The learned Chief Justice had no jurisdiction to determine whether it complied with the terms of the section. The exact form must be followed. It is not sufficient to be substantially the same. The cases under the Act relating to Short Forms of Conveyances, Bills of Sales Act, and similar Acts, shew what strictness is required in forms of this character: *Re Gilchrist and Island* (1886), 11 O.R. 537; *Delmatter v. Brown Bros.* (1905), 9 O.L.R. 351; Encyc. of Laws of England, vol. 2, p. 139; *Henry v. Armitage* (1883), 53 L.J.N.S.Q.B. 111. The letter from the secretary of the board attached to the contract, which stated that the contract had not been approved by the board, was clear evidence of such fact, and the learned Chief Justice should not have allowed such letter to be detached from the contract and the contract put in evidence without such letter. No freight rate was given to the plaintiff at the time of the shipment, nor is any rate stated in the contract. This is most material, as the object is that the different rates should be laid before the plaintiff and an opportunity afforded him of deciding whether he would ship at the higher or lower rate. The plaintiff is therefore entitled to recover the full value of the stock injured.

*G. F. Shepley*, K.C., for the respondents. This was not a contract to take effect merely between the plaintiff and the New York, New Haven and Hartford Railway Company, but as between that company and the companies upon whose lines of railway the stock would necessarily have to be carried to reach its destination. This is not only the effect of the contract; but it is expressly so stated on its face. The agent had power to enter into the contract, and it enured to the benefit of all the connecting companies. The case of *Hall v. North Eastern R.W. Co.*, L.R. 10 Q.B. 437, is in point, and shews that the contract is to apply during the whole of the carriage. This case was considered and approved of in *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 401. There is nothing illegal in the contract. It is lawful according to the laws of Massachusetts, and one which the plaintiff could properly enter into there: *Squire v. New York Central R.W. Co.* (1867), 98 Mass. 239; *Graves v. Adams Express Co.* (1900), 176 Mass. 280. If approval by the railway board is required, the contract has been approved by the board. It is substantially the same as the contract in force in Canada, which has been approved of by the board. Section 340 does not give or require any special form to be used. All that it says is that they may enter into a certain class of contract providing for limitation of liability. The plaintiff knew what the different rates were, and what rate he would have to pay if he desired the companies to assume full responsibility. The plaintiff can therefore only recover the amount limited by the special contract: *Costello v. Grand Trunk R.W. Co.* (1906), 7 O.W.R. 846; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611; *Squire v. New York Central R.W. Co.*, 98 Mass. 239. In the *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1, which was based on the case of *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412, all that was decided was that the company could not relieve themselves from liability altogether.

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January 19. OSLER, J.A.:—The contract under which the plaintiff's horses were delivered to the New York, New Haven and Hartford R.W. Co. was a through contract for the carriage of a car-load of horses from Brockton, Mass., to Grimsby, Ontario, over that company's line and the lines of connecting carriers to the place of delivery.

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By this contract the plaintiff declared and agreed that the horses had been received by the carrier for itself and on behalf of connecting carriers for transportation subject to the official tariffs, classifications and rules of the company, and upon certain expressed terms and conditions, which were admitted and accepted by the shipper as just and reasonable. One of such terms was that the shipper or consignee was to pay freight to the carrier at the rate of \_\_\_\_\_, which was the last published tariff rate, based upon the express condition that the carrier assumed liability on the said live stock, *i.e.*, horses, to the extent only of the agreed valuation, upon which valuation was based the rate charged for the transportation, and beyond which valuation neither the carrier nor any connecting carrier should be liable in any event, whether the loss or damage occurred through the negligence of the carrier or connecting carrier or their employees or otherwise. In respect of horses the valuation was not to exceed \$100 on each animal, and in no event was the carrier's liability to exceed \$1,200 upon any car-load.

By the contract the plaintiff also declared that he had the option of shipping the horses at a higher rate of freight, according to the official tariffs of the carrier and connecting carriers, but had voluntarily decided to ship them under the contract at the reduced rate of freight first mentioned.

For the loss of a car-load of horses destroyed during their carriage in a collision caused by the admitted negligence of the defendants, one of the connecting carriers, this action was brought. The defendants pleaded the contract as exempting them from liability beyond the stipulated sum. The value of the horses was found to be \$16,000, but the learned trial Judge held that the plaintiff was bound by the terms of his contract, and that he could recover no more than \$1,200, for which sum he gave judgment.

The plaintiff appeals, contending that the condition is not binding upon him.

According to the principles laid down in *Hall v. North-Eastern R. W. Co.*, L. R. 10 Q. B. 437, applied and acted upon in this Court in *Bicknell v. Grand Trunk R. W. Co.*, 26 A. R. 431, where the authorities on the subject are cited, the defendants, as connecting carriers are, speaking generally, entitled

to rely upon the terms and conditions of the contract made with the first carrier, under which the property in question was delivered and received for through transportation and carriage.

In *Robertson v. Grand Trunk R.W. Co.* (1894), 21 A.R. 204, S.C., 24 S.C.R. 611, sec. 246 (3) of the Railway Act of 1888, 51 Vict. ch. 29 (D.), was considered. That section provided that every person aggrieved by any neglect in the premises—i.e., neglect in the carriage and transporting of goods received for carriage—should have an action therefor against the company, from which action the company should not be relieved by any notice, condition or declaration if the damage arose from any negligence or omission of the company or its servants.

It was held that this clause did not prevent a railway company from entering into a special contract for the carriage of goods limiting its liability as to the amount of damages to be recovered for loss of or injury to such goods arising from negligence.

"The distinction made was between the contract for exemption from all liability and one fixing or limiting the amount of damages beyond which no claim could be made or recovered in any case whatever, including cases of negligence:" *per* Maclellan, J.A., in *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (C.A.), 8 O.L.R. 1, 4. In that case, as in *Vogel v. Grand Trunk R.W. Co.* (1884), 10 A.R. 162, S.C. (1885), 11 S.C.R. 612, the contract was held to be one for complete exemption from liability, and was, consequently, invalidated by the express language of the section.

Unless, therefore, the provisions of more recent legislation make a difference, *Robertson's* case is an authority in favour of the defendants, and the plaintiff cannot recover more than the agreed value of the goods.

The Railway Act of 1903 is now consolidated in the Revised Statutes of Canada, ch. 37, which was in force when the contract in question was made.

"Company" means a railway company; "traffic" means the traffic of passengers, goods and rolling stock: sec. 2, (4a) and (31). And the Act applies (subject as therein provided) to all persons, companies and railways, other than Government railways, within the legislative authority of Parliament: sec. 5.

Section 284, under the heading, "Accommodation for Traffic,"

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enacts that the company shall, according to its powers, furnish at the place of starting and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway, and without delay and with due care and diligence receive, carry and deliver all such traffic.

Sub-section 7. "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

This clause is substantially the same as sec. 246 (3) of the Act of 1888, and, except in so far as it is controlled or qualified by the words "subject to this Act," it must, following the *Robertson* case, be held that it does not prevent the shipper and the company from contracting for a limited liability, even in the case of negligence on the part of the latter, if nothing is to be elsewhere found in the Act restricting their power to do so.

The plaintiff relies on sec. 340 as the qualifying clause, and contends that, notwithstanding the contract, the defendants are liable for the full value of the horses because the contract has not been approved by the Board of Railway Commissioners. This section enacts that "no contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the board."

2. The board may in any case or by regulation determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

The provisions of this section must be read with those of sub-sec. 7 of sec. 284. It is the section, or one of the sections,

to which the latter section is made subject. Section 340 was the only section expressly referred to on the argument, but the other was not overlooked, as the case was argued as if, subject to sec. 340 (sec. 275 of the Railway Act of 1903), the law remained as decided by the *Robertson* case, which was cited by the respondents, in which the power to restrict, impair or limit the liability as regarded the amount of damages recovered, even in cases of negligence, was affirmed. We must take it that Parliament was aware that notwithstanding the provisions of sec. 246 of the Railway Act of 1888, this had been so held, and that they intended by sec. 340 of the present Act to qualify the rights of the shipper and the railway company in this respect, and to declare that, unless authorized by the Board of Railway Commissioners, no contract, condition, declaration or notice limiting liability should be valid, but that if and to the extent to which such a class of contract was affirmed by the board it should stand good.

Whether sec. 340 confers upon the board power to authorize the railway company to adopt a form of contract exempting them from liability in cases of negligence it is not necessary to decide. It does not in terms purport to do so, and it may stand quite consistently with the earlier section, the predecessor of which had already in *Robertson's* case, where the conditions of the contract were in the same terms as those in the present case, and where the loss had occurred through negligence, been construed as not disabling the company from contracting for the limitation of the amount of damages recoverable in such a case. Section 340 now prevents them from doing that unless the board has authorized such a class of contract. The words, "subject to this Act," in sec. 284 (7), must have some meaning given to them if possible, and the only section of the Act to which they naturally relate is sec. 340. That section does not purport to empower the board to authorize a contract which absolutely relieves the company from liability in the case of negligence. It provides only that no contract, etc., impairing, restricting or limiting liability shall relieve them unless such class of contract has been authorized or approved by the board, and the question is whether the contract on which the defendants rely is valid under the section.

I am of opinion that it is.

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On the 17th of October, 1904, on the application of the defendants and of other Canadian railway companies for the approval of their form of bills of lading and other traffic forms, the board made an order, in pursuance of sec. 275 of the Railway Act of 1903, now sec. 340 of the Revised Act, permitting the applicants to continue the use of their present forms until the board should otherwise order. One of the forms approved is a form of "Live Stock Special Contract," which contains a clause by which a shipper, accepting a lower specified rate of transportation charges, agrees that the company's liability for loss or damage to individual animals or for a car-load shall in no case exceed certain specified sums of the same amount as those mentioned in the contract now in question. In effect, the restriction clause in the contract, although differently expressed, is the same as that of the form authorized by the board. In some other respects there are differences between them, which, however, in the view I take of the meaning of the section, are not important. I construe the words, "unless such class of contract is authorized or approved by the board," as meaning unless the board authorizes or approves, not necessarily of the whole terms of any particular contract of carriage, but of the general use of a contract containing a provision restricting or limiting the company's liability; in other words, unless the board approves of the principle of a contract of that class or kind.

This the board has certainly done by its order of the 17th October, 1904, and, if sec. 340 applies to the case of a contract made with a foreign railway company, involving the carriage of traffic by means of the connecting lines of different companies to a point in Canada, the class of contract into which the plaintiff entered has been approved and the condition is binding. But, as the authority of the board extends only to persons, companies and railways within the authority of Parliament, it may, perhaps, be doubted whether the section extends to a contract with a foreign railway company under which traffic is carried into or through this country by means of another and connecting railway. Section 336 provides *inter alia* that, as respects all traffic which shall be carried from any point in a foreign country into Canada by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint

tariff for such continuous route shall be filed with the board, but nothing that I can see in the Act contemplates a new contract being entered into between the consignee and the Canadian railway company which receives the goods from the foreign railway company for the purpose of carrying them on to their place of destination here. Indeed, sec. 337, which provides for the carriage being continuous to that place from the place of shipment, looks the other way. However, upon this point I express no final opinion.

Whether, therefore, sec. 340 applies or not to such a case as the present, the action must fail. If it does, the class of contract limiting liability under which the goods were carried has been approved. If it does not, the plaintiff has executed such contract, and *ex proprio vigore* is bound by its terms. I note sec. 306 (4) merely to shew that it has not been overlooked. It seems to refer to proceedings under such Acts as the Fatal Accidents Act or the Workmen's Compensation Act or other provincial laws.

I refer also to *Hayward v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 158, 6 Can. Ry. Cas. 411; *Mercer v. Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585; and *Sheppard v. Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259; *Booth v. Canadian Pacific R.W. Co.* (1906), 5 Can. R.C. 389; *Costello v. Grand Trunk R.W. Co.*, 7 O.W.R. 846, where the sections 284 (7) and 340 were considered.

Appeal dismissed with costs.

MACLAREN, J.A.:—Three questions may be considered on the present appeal. First, whether, on a proper construction of the contract entered into between the plaintiff and the New York, New Haven and Hartford Railroad Co., at Brockton, for the limitation of liability on the horses in question to \$1,200, such limitation was valid, and would have been applicable to the circumstances of this case if the accident had occurred on that company's line, and there were no statutory difficulty such as that referred to in question three. Second, whether the contract is applicable to the Grand Trunk R.W. Co. at all, even when carrying the horses over part of the State of Vermont. And, third, if so, is it invalid in Canada on account of the provisions

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First, as to the contract itself. It is a special one, and is called a "Live Stock Contract," and provides that the company only assumes liability on the basis of an agreed valuation of \$100 for each horse and not more than \$1,200 on any car-load, and that the carrier shall not in any event be liable for more.

Such cases as *Price v. Union Lighterage Co.*, [1904] 1 K.B. 112, and *The Pearlmooer*, [1904] P. 286, shew that where, as here, the damage is caused by the negligence of the carrier or his servants, such restrictions will not be held to apply unless special words are used to make it clearly appear that such negligence was meant to be covered. The contract signed by the plaintiff in this case provides that such shall be the limit of liability, "whether the loss or damage occurs through the negligence of the said carrier or connecting carriers or their employees or otherwise." Moreover, the plaintiff was familiar with such contracts, and must be held to have been aware of the terms of the contract he was making.

As to the second question, the contract was a single one for transportation from Brockton to Grimsby. The plaintiff was well aware that the New York, New Haven and Hartford Co. only ran to Boston, and that the rest of the distance the horses were to be carried by three companies, of which the Grand Trunk was the last, and the contract formally declared that the contracting company was acting not only for itself, but also on behalf of the connecting carriers. The fact that each of these companies in turn took over the car with the horses shews that they recognized and adopted the act of the first company in so contracting on their behalf. The defendants and the other companies became what Blackburn, J., in *Hall v. North Eastern R.W. Co.*, L.R. 10 Q.B. 437, at p. 441, calls sub-contractors, and assumed the burdens and became entitled to the benefits of the original contract. Indeed, even if there had not been the express mention of these subsequent carriers in the contract, it would, in the circumstances of this case, have been held to be implied, as it was in the *Hall* case, as it was clearly in the contemplation of both parties. To this effect is also the decision of this Court in *Bicknell v. Grand Trunk R.W. Co.*, 26 A.R. 431.

The third question is the only one that really presents any difficulty. It is not a case like *Vogel v. Grand Trunk R.W. Co.*, 11 S.C.R. 612, or *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 8 O.L.R. 1, where the question was as to the validity of a contract for exemption of the carrier from all liability in cases of negligence. It was there held that sections in the Railway Acts of 1879 and 1888 respectively almost identical with sub-sec. 7 of sec. 284 of the present Railway Act prevented the company from obtaining the benefit of a clause stipulating for exemption from all liability in a case of negligence.

The question in this case is not the exemption from all liability, but whether the extent of the liability of the company can be restricted or limited at all by agreement, the same as that in *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. There it was held that the *Vogel* case did not apply, the Chief Justice saying, at p. 616, that "nothing there (in the *Vogel* case) decided that it was not competent to the respondents (the company) to enter into an agreement for pre-ascertained damages, or for limited liability, if that term is preferred. The sub-section—246 (3)—which is invoked by the appellant (Robertson) is worded as follows: 'Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants.' This is an enactment which ought not to be extended beyond its literal meaning, and that is plainly confined to the prohibition of any contract relieving the company from liability for negligence. To say that it is to shut out the company from liability for damages by an agreement fixing a value on goods carried would be to extend its language by implication to a case which does not appear from any part of the Act itself to have been within the contemplation of the legislature."

According to sec. 284 of R.S.C. ch. 37, which applies to the present case, the duty of the company was "without delay, and with due care and diligence to receive, carry and deliver" the horses in question; and sub-sec. 7 provides that "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act,

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have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

It will be seen that the language of this sub-section is almost identical with the sub-section from the Act of 1888 quoted by the Chief Justice of the Supreme Court in the *Robertson* case, and all that was said by him in that case would apply equally to this, subject to one qualification, viz., that sec. 340 of the present Act was not in the Act of 1888, and by the added words, "subject to this Act," its provisions and effect must be considered.

Section 340 reads as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the board.

"2. The board may in any case or by regulation determine the extent to which the liability of the company may be so impaired, restricted or limited.

"3. The board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

We find that the Dominion Railway Commissioners, being the board referred to in this section, did, on the 7th of October, 1904, authorize a form of live stock contract whereby the Grand Trunk Railway might limit its liability, and when the destination was beyond its own lines, it might act as agent of the owner or shipper in handing over the stock to connecting carriers, which were also to have the benefit and protection of the contract.

It was not claimed before us that in this order the board had exceeded its powers.

While the present contract is not an exact copy of the one so authorized and approved, they are substantially the same, and belong to the same class, so that in this respect the present contract comes literally within sec. 340.

There remains, then, only the question whether that part of

the contract stipulating for the limitation of damages when caused by the negligence of the company's servants can be upheld. Any difficulty as to the statute being removed, the present case is governed by the decision of the Supreme Court in the *Robertson* case, which we should follow, and the appeal must be dismissed.

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MEREDITH, J.A.:—There seems to me to be no sort of doubt that, under the order of the Board of Railway Commissioners for Canada, the respondents were authorized to limit their liability by contract, as it was limited in this case.

By the contract in question, liability, of not only the contracting company, but also of any connecting carrier, was so limited; and the contracting company obviously had power to make such a contract for the respondents.

The only debatable ground, as it seems to me, upon which the plaintiff could have based his claim, has been throughout ignored or undiscovered by him, even upon this appeal, though the point was more than once suggested.

That point is whether, having regard to sub-sec. 7 of sec. 284 of the Railway Act, the defendants could, under any circumstances, limit their liability, in such a case as this, arising out of their negligence. Prior to that enactment assuming its present form, according to the cases, they could not have exempted themselves from all liability: *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 5 O.L.R. 742, and on appeal, 8 O.L.R. 1; but could have limited their liability as they have done in this case: *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611.

The effect of the present enactment, in some such respects, has been considered in the Manitoba case of *Hayward v. Canadian Pacific R.W. Co.*, and in the Ontario case of *Mercer v. Canadian Pacific R.W. Co.*, in a Divisional Court,\* and has been observed upon in another Ontario Divisional Court in the case of *Sheppard v. Canadian Pacific R.W. Co.*, 16 O.L.R. 269; but, as the parties have not in any manner raised any such question in this case, and as it has not been discussed at any stage of it, I cannot see how it can rightly be considered now. The point is an important one, and one upon which I must decline to express an opinion until

\*17 O.L.R. 585.



- C. A. it has been properly raised and has been argued: see *Eyre v. Highway Board of the New Forest Union* (1892), 8 Times L.R. 648.  
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 SUTHERLAND I can see nothing for it but to dismiss the appeal.  
 v.  
 THE GRAND MOSS, C.J.O., and GARROW, J.A., concurred.  
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[IN THE COURT OF APPEAL.]

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 July 23. *Street Railways—Negligence—Front Vestibule—Closing of—Requiring Entrance*  
 Dec. 3. *of Passengers by Rear of Car—Order of Railway and Municipal Board—*  
*Injury to Passenger in Attempting to Enter by Front Door—Terms of Order—*  
*Necessary to Give Notice of—Finding of Negligence on One Ground—Effect*  
*of Negating Negligence on Other Alleged Grounds.*

In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of the defendants' cars was enclosed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and notwithstanding started the car. There was no notice on the door notifying the public of the non-admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non-admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence.

The Divisional Court, on appeal to it, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obeying the board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence.

The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negating negligence on the other alleged grounds.

THIS was an appeal from the judgment of the Divisional Court, setting aside judgment for the plaintiff in an action brought by her to recover damages sustained through the alleged negligence of the defendants.

The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at Toronto, on March 9th, 1908.

The learned Chief Justice submitted questions to the jury, which, with their answers, were as follows:—

1. Were the injuries which the plaintiff sustained caused by any negligence of the defendants? A. Yes.

2. If so, wherein did such negligence consist? A. No "no admittance" notice on outside door.

3. Or were the plaintiff's injuries caused by any negligence on her part? A. No.

4. If so, wherein did her negligence consist?

5. Could the plaintiff by the exercise of reasonable care have avoided the accident? A. No.

6. If you answer "yes" to the last question, what could she have done to avoid the accident?

7. At what sum do you assess the compensation to be awarded her, if she is entitled to any? A. \$750.

Upon these findings the learned Chief Justice entered judgment for the plaintiff for the \$750.

From this judgment the defendants appealed to the Divisional Court.

On May 18th, 1908, the appeal was heard before MEREDITH, C.J. C.P. MACMAHON and TEETZEL, JJ.

*H. H. Dewart*, K.C., for the appellants.

*T. C. Robinette*, K.C., for the respondents.

July 23. TEETZEL, J.:—Appeal by defendants from the judgment of Falconbridge, C.J., upon the findings of a jury awarding the plaintiff \$750 damages.

Section 79 of the Ontario Railway Act, 1906, sub-sec. 1, provides: "All cars in use for the transportation of passengers in November, December, January, February, March and April in each year, which, while in motion, require the constant care or service of a motorman upon the platforms of the car or upon one of them, shall have their platforms so enclosed as to protect the motormen from exposure to wind and weather in such manner as the board shall approve."

Application having been made to the Ontario Railway and Municipal Board on behalf of the employees of the Toronto Railway Company, the board, under the provisions of secs. 17, 18 and 19 of the Ontario Railway and Municipal Board Act, 1906, on the 17th May, 1907, ordered that "the front platforms of all cars used by the respondents (the defendants herein) in the city of Toronto shall,

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on or before the first day of November, 1907, be enclosed to protect the motormen from exposure to wind and weather in the following manner, to wit, by a door to be fastened by a spring-lock on the inside so as to be capable of being opened by the motormen to permit of the exit of passengers."

Though not embodied in the formal order issued, the board in delivering judgment made these observations: "It will be necessary, however, to prevent passengers from entering the car by this front vestibule door. This arrangement will make it necessary for passengers to enter from the rear end of the car and leave the car by the front vestibule door. The board are of opinion that it will be no hardship on the travelling public to submit to this discipline."

The car in question was equipped in the manner prescribed by the order.

On December 1st, 1907, the plaintiff, not being aware of the order and of the new equipment, attempted to get on the car at the front. She says the door being closed she stood on the step waiting for the motorman to open it for her, and when he did not open it, she knocked on the door, and "he just pointed with his thumb for me to go to the back of the car, but he did not offer to stop his car at all and I fell."

The motorman denies having seen the plaintiff or having heard her knock on the door, or having motioned to her as alleged by the plaintiff.

There was no notice on the door informing the public that there was no admission through it.

The jury were asked:—

(1) Were the injuries which the plaintiff sustained caused by any negligence of the defendants?

(2) If so, wherein did such negligence consist?

Their answer to the first question was "Yes," and to the second "No 'no admittance' notice on outside of door." They also negatived contributory negligence, and assessed the damages at \$750.

In his charge the learned Chief Justice told the jury that "the plaintiff charges that there were three different matters of negligence, any one of which you may find, or all of them; first, in that there was no notice on the door that the door was closed for entrance; second, in starting the car, if you find it to be the case, when she

was already on the step; thirdly, in not opening the door to let her in. There is no particular comment that I have to make upon those except this, that with reference to the third one that will involve the finding whether the motorman actually saw her or not. You have heard the evidence about that, whether he saw her, or whether he ought to have seen her, because it amounts to the same thing. It is pointed out that is a very serious charge to make against a man that he would be guilty of such absolute inhumanity as to continue driving a car at an increasing rate of speed if he actually saw a poor girl hanging on there; but if he did not see her and ought to have seen her the negligence of the company is the same thing."

The first question for determination is whether the specific finding of negligence, in answer to the second question, can be supported.

That there was no notice on the door intimating that it was closed for entrance was not disputed. I am of opinion that in the circumstances of this case the omission to provide any such notice was not an act of negligence by the defendants. The defendants by putting the door on complied strictly with the order of the board. That order made no provision for notice, and there is nothing in the circumstances of the case which would impose any duty on the defendants to put up such a notice. The closed door itself, with no facility for opening it on the outside, was ample notice to the public that it was not intended for ingress. Putting the door on was not the voluntary act of the defendants, but a duty imposed upon them by authority of the Legislature, for the non-performance of which they would be subject to penalties. Having performed this duty to the letter, they should not be liable for negligence in omitting something which did not occur to the board as necessary to prevent injury to the public.

While the learned Chief Justice did not expressly tell the jury that the omission to put up the notice was an act of negligence, the jury were warranted in inferring from his mentioning it as one of the three matters of negligence complained of by the plaintiff which they might find that it did constitute negligence.

The judgment must be set aside, but it remains to be con-

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sidered whether there should be a new trial or judgment for the defendants.

The answer depends upon whether, expressly finding the negligence to have been one of the three acts mentioned to them by the learned Chief Justice, the jury must be considered as having negated the other two alleged acts.

I do not think, in the circumstances of this case, any such inference can be properly drawn. The learned Chief Justice, in effect, told the jury that it was unnecessary for them to find more than one of the three acts of alleged negligence. No intimation was given that, if they omitted to expressly find in favour of the plaintiff on any one of them, their omission would be taken as a finding in favour of the defendants on that charge, or that it was their duty to adjudicate upon each of them; so, having by the answer to the first question found the defendants guilty of negligence which caused the plaintiff's injury, and having been, in effect, told that the failure to put up the notice was an act of negligence, they might reasonably consider it was unnecessary for them to do more than the least their instructions indicated, and thus avoid the responsibility of passing upon the conflicting evidence between the plaintiff and the defendant as to the other charges of negligence.

The case is distinguishable from *Andreas v. Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1, where, instead of the jury being told that they might find one of two charges of negligence, they were specifically asked by the trial Judge to find in regard to the ringing of the bell and the blowing of the whistle. They did not expressly find upon these matters, but found that the defendants failed to reduce the speed of the train as required by the Railway Act.

The learned Chief Justice, at p. 10, after citing an extract from the charge, says: "Now, the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce the speed, under sec. 259 of the Act, must be considered as having negated all the other charges of negligence."

This case does not establish, nor is there any general rule, that "all negligence is negated which is not expressly found," but each case must depend upon its own circumstances.

In *Cobban v. Canadian Pacific R.W. Co.* (1894), 26 O.R. 732, and 26 A.R. 115, it was held that where the jury find negligence and then define the negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may, in their discretion, order a new trial, although there is no evidence to support the specific findings.

In *Hanly v. Michigan Central R.W. Co.* (1907), 13 O.L.R. 560, Osler, J.A., at p. 564, says: "The evidence of failure to give either of the statutory warnings was conflicting, and the weight of evidence is against the plaintiff's contention on that point—a fact which quite accounts for the omission of the jury to answer the question by which their attention was specially directed to it as the ground of negligence prominently put forward and mainly relied upon at the trial. If we could see that the consideration of this had been merely overlooked by the jury, we might think it right to direct a new trial, as was done in the case of *Cobban v. Canadian Pacific R.W. Co.*," *supra*.

In *Hinsley v. London Street R.W. Co.* (1908), 16 O.L.R. 350, at p. 353, the same learned Judge says: "Another act of negligence in reference to the management of the fender of the car was, however, also relied upon, but the jury were told that they need not consider this if they found for the plaintiff on the other grounds, which we now hold not to be tenable, and it was accordingly not passed upon by them. I cannot say that there was not some evidence of negligence in this respect, and therefore there must be a new trial."

*Russell v. Bell Telephone Co.* (1908), 11 O.W.R. 808, is another case in which a Divisional Court exercised the discretion of granting a new trial after the jury had failed to answer specifically upon two charges of negligence, but found in favour of the plaintiff upon another charge of negligence, which the trial Judge ruled was not supported by the evidence.

I think, both upon authority and upon principle, that, in view of the fact that in this case there is evidence upon which, if believed, the jury could have found negligence against the defendants, and of the circumstances already alluded to, the appeal should be allowed, the judgment set aside, and a new trial granted without costs of the former trial or of the appeal.

MEREDITH, C.J., and MACMAHON, J., concurred.

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From this judgment the defendants appealed to the Court of Appeal.

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On November 18, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*H. H. Dewart*, K.C., for the appellants. The Divisional Court improperly directed a new trial. The fact of the jury finding on only one of the grounds of negligence submitted to them must be taken as negating any negligence on the other alleged grounds: *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 560; *Cooledge v. Toronto R.W. Co.* (1907), 10 O.W.R. 739. The ground on which the jury did find, and which was the proximate cause of the injury, did not amount to negligence on the defendants' part. The defendants were acting in accordance with the order of the Railway and Municipal Board, under sec. 16 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31. The order did not require any notice to be given. The accident, however, was caused by the plaintiff's own negligence in attempting to board the car by the front vestibule, when she knew the door was closed, without having first called the motorman's attention to the fact that she desired to enter that way.

*J. M. Godfrey*, for the respondents. The omission of a non-admittance notice was evidence of negligence to go to the jury. The order of the Railway Board did not relieve the defendants from exercising reasonable care in the management of their railway. The public were accustomed to enter by the front door. The defendants were bound to know that some time would elapse before the public would be aware of the existence of the order, and it was their duty, therefore, to notify the public of the change made. The jury assumed, from the Chief Justice's charge, that it was only necessary for them to find on one ground of negligence. Their attention should have been called to the fact that they could find on one or all of the grounds. If, therefore, there is any doubt as to the ground on which the jury did find constituting negligence, the plaintiff is entitled to have the case again submitted to them: *Cobban v. Canadian Pacific R.W. Co.*, 23 A.R. 115; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 567. There was a duty imposed on those in charge of the car to see that intending

passengers were safely on the car before they attempted to start it. *Cobban v. Canadian Pacific R.W. Co.* is clearly in favour of the plaintiff. The point relied on by the defendants was only the opinion of one of the Judges. The Divisional Court, therefore, exercised a proper discretion in granting a new trial: *Russell v. Bell Telephone Co.*, 11 O.W.R. 808. There was no contributory negligence on the plaintiff's part. The evidence is clear that when the plaintiff got on the front step she rapped on the window and the motorman turned towards her and saw her, beckoning towards the rear of the car, and notwithstanding he saw her remaining on the step he started the car and she was thrown off and injured. In any event this was a question for the jury.

*H. H. Dewart*, in reply. The plaintiff cannot insist on notice, as she knew of the change that had been made. The motorman never saw the plaintiff, and the jury have substantially so found. There was no suggestion at the trial as to the starting of the car before the passengers were safely on. The plaintiff, if she desired a finding on other grounds, should have asked for a finding on them. As to the defendants asking for a new trial, this was only asked for in the alternative. They have a right to have the case decided as it stood on the finding of the jury.

December 3. OSLER, J.A.:—I am unable to agree with the judgment of the Divisional Court. Three grounds of negligence were put forward at the trial, viz.: (1) That there was no notice on the front door of the car by which the plaintiff was attempting to enter, that that door was closed against passengers, and that they were to enter at the rear door; (2) that the defendants' motorman carelessly started the car or started it with a jolt while the plaintiff was on the front step attempting to get in; and (3) that the motorman did not open the door to let her in, though he saw her standing on the step.

The first and second grounds were charged in the statement of claim; the third was not. As to the fact of the absence of notice on the front door, there was no contest. The defendants had closed the front doors of their cars to passengers for the purpose of entrance by the authority and order of the Railway and Municipal Board, and had complied with all the terms of the order, and the contention was that it was, nevertheless, negli-

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gence to omit to warn passengers by a "no admittance" notice, or something of that kind, not to attempt to enter by the front door, although it was closed in fact and there was no outside handle on it.

The other grounds of negligence were the main subject of dispute, and as to both of them there was considerable conflict of testimony, which was dealt with at length in the charge of the learned trial Judge, who, after fully analyzing and explaining it, finally told the jury, "the plaintiff charges that there were three different matters of negligence, any one of which you may find or all of them," and he then stated them in detail as above. The jury found that the injuries which the plaintiff sustained were caused by the negligence of the defendants; that such negligence consisted in the absence of a "no admittance" notice on outside the door; that the plaintiff's injuries were not caused by any negligence on her part, and that she could not by the exercise of reasonable care have avoided the accident. The plaintiff did not request that the jury should be asked to reconsider their findings or express themselves further as to the other grounds of negligence, and the learned Judge directed judgment for the plaintiff for the damages assessed.

The defendants moved against the judgment, contending that the omission of the notice was not an act of neglect on their part, as they had complied with the order of the Railway and Municipal Board in doing what they did, and that there was nothing in the appearance of the door or otherwise which could be regarded as an invitation to anyone to enter by it. The Divisional Court agreed with this contention, but directed a new trial in order that the other grounds of negligence, upon which there had been no express finding, might be dealt with.

In my opinion, this case is not fairly distinguishable from the cases of *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 560, or *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1. There was no misdirection. The plaintiff's case, as regards all the grounds on which it was sought to fasten liability on the defendants, was fully explained to the jury. Nothing was withdrawn from them. They were expressly told that they might find any one or all of the grounds of negligence charged, and on such a charge, where a jury, in answer to the question whether the

plaintiff's injury was sustained by any negligence of the defendants, answer "yes," and then find that such negligence was one out of several grounds put forward and submitted for their consideration, I think that, in fairness to the defendants, it ought as a general rule to be held that the jury has negatived the other grounds, and, in the conflict of testimony, has considered them as not proved. Every case must depend on its own circumstances, and where it can be seen that the jury has not properly considered the evidence, or has travelled out of the record to find something not charged or relied upon, or where the findings as to negligence are confused or inappropriate (which may have been the ground on which the case of *Russell v. Bell Telephone Co.*, 11 O.W.R. 808, proceeded), or when some particular act of negligence has been withdrawn from them absolutely or contingently upon their finding some other act proved (*Hinsley v. London Street R.W. Co.*, 16 O.L.R. 350), there is little difficulty in directing a new trial, where there is evidence of other acts of negligence.

But in a case like the present, when there has been no miscarriage of any kind, something more ought to appear to justify a new trial than merely the fact that the jury has not expressly found with reference to each act of negligence. Otherwise every such act may become the subject of a separate trial, and a new trial, instead of being a means of correcting a miscarriage of justice, will become an engine of oppression by protracting litigation and increasing costs. And see *Lloyd v. Woolland Brothers* (1902), 19 Times L.R. 32.

I agree with the Divisional Court that the not putting a notice on the door was not a negligent omission in the circumstances. No duty to do so was imposed by the order of the Railway Board, and the closed door itself, with the absence of any means for opening it from the outside, was, as Teetzel, J., speaking for the Court, says, ample notice to the public that the door was not intended for ingress.

On the whole, I am of opinion that the appeal should be allowed and the action dismissed.

GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court setting aside the judgment at the

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trial before Falconbridge, C.J., and a jury, in favour of the plaintiff, and directing a new trial.

The action was brought to recover damages sustained by the plaintiff in being thrown from a street car operated by the defendants, owing, as was alleged, to the negligence of the defendants.

On December 1st, 1907, the plaintiff, desiring to enter as a passenger the car in question, attempted to enter by the front door, which was closed, and could not be opened from the outside, instead of by the rear door, which was open, and was at the time the proper door by which to enter, and, while standing on the step, the car started, and she was thrown or fell to the ground and was injured. The door by which the plaintiff attempted to enter was kept closed under an order of the Ontario Railway and Municipal Board, dated May 17th, 1907, requiring the front doors of all cars to be so closed during the winter months for the protection of the motorman; the order to come into effect on November 1st, 1907.

There was no door knob on the outside, and it could only be opened from the inside, the intention being that it should only be opened to permit passengers to leave the car, but not to enter.

The allegations of negligence in the statement of claim were: (1) No notice had been put up that the door was closed; (2) the motorman knew the plaintiff was on the step and yet started the car.

The jury found (1) the injuries to plaintiff were caused by the defendant's negligence, (2) such negligence consisting in "no admittance notice on outside of door," (3) no contributory negligence, and (4) damages \$750.

In the charge to the jury the learned Chief Justice said that there were three grounds of negligence relied on, any one of which or all of which they might find, namely: "First, in that there was no notice on the door that the door was closed for entrance; second, in starting the car, if you find it to be the case, when she was already on the step; and thirdly, in not opening the door to let her in." The absence of the notice was not disputed. There was a direct conflict upon the question whether or not the motorman saw the plaintiff on the step, the plaintiff alleging that he did and the motorman denying the fact.

And this conflict, the only one in the case, comprised the chief feature of the very full and careful charge, early in which the learned Chief Justice said: "The evidence in this case, as in the one tried yesterday, is pretty short and pointed, and it comes down to the broad proposition of which witnesses you choose to believe." The Divisional Court held that the failure to put up a notice of non-admittance was not, under the circumstances, negligence, but granted a new trial upon the ground that the jury might have been misled by the charge into believing that it was only necessary to pass upon one of the three grounds of negligence relied on. And reference was made to *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1, which was distinguished, and to *Cobban v. Canadian Pacific R.W. Co.*, 26 A.R. 115; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 566; *Hinsley v. London Street R.W. Co.*, 16 O.L.R. 350, and *Russell v. Bell Telephone Co.*, 11 O.W.R. 808.

I agree with the Divisional Court that it was not, under the circumstances, negligence nor evidence of negligence not to post up a notice of non-admittance. The closed door and the absence of a knob or other outside means of opening it ought to have been sufficient, especially to one accustomed, as the plaintiff was, to the daily use of the street cars, and who admits that she knew of such doors having been put up, to repel any question of invitation. And upon this ground the action should have been dismissed at the trial. And I am, with deference, of the opinion that no sufficient ground is shewn for granting a new trial.

It is the rule, and a wise and sensible one, that when a jury is told that they may find any one or more of several heads of negligence upon the evidence, and they find only one, the others are by necessary implication to be taken as found in favour of the other side, or negatived. To this rule, as to other rules, there are, doubtless, exceptions, but the rule itself is clear, and was not laid down for the first time by any means in *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1. See, in addition to the other cases before referred to, *Lloyd v. Woolland Brothers*, 19 Times L. R. 32 (C.A.).

Nothing was withdrawn or withheld from the jury, as was the case in *Russell v. Bell Telephone Co.* and *Hinsley v. London*

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*Street R.W. Co.* The jury was plainly invited to find all or any of the several grounds on which the plaintiff relied. No one suggests that all the evidence which could be given was not given; no objection to the charge was made on either side, and none could, I think, properly have been made. The conflict of testimony between the plaintiff and the motorman was very clearly and very fully pointed out, and the jury told that, in so far as that conflict was concerned, it was purely a question of credibility, and no reason appears to justify the assumption that this, the main burden of the whole charge, was wholly ignored by the jury in favour of the other and simpler finding of a fact which was never for a moment in dispute.

Why should it not be assumed, knowing as we all do the proneness of juries to favour the plaintiff in such an action, that the failure to answer the second and third questions in favour of this plaintiff was not because of any oversight on their part, or because they were in any way misled by the charge, but because of the weakness of the plaintiff's case, which rested wholly on her own testimony. In such cases it is, of course, quite permissible to examine the whole evidence for the purpose of seeing if injustice would be done by applying the rule. This was done in *Cobban v. Canadian Pacific R.W. Co.* and in some of the other cases before referred to, and if in such examination it appears that there is strong evidence of negligence upon the heads of negligence not passed upon by the jury, a new trial might well be granted as a matter of discretion. But that is not this case. Here, as in the case of *Hanley v. Michigan Central R.W. Co.*, the evidence is not merely conflicting, but very weak, for how can any one be certain that, at seven o'clock of a December night, another person, with practically only a moment's opportunity, saw him or her through a glass door, as the plaintiff was, and it all depends upon that. A new trial was refused in that case, as I think it should have been in this, and for similar reasons.

I would allow the appeal and dismiss the action with costs throughout to the defendants, if they ask for them.

MEREDITH, J.A.:—The general rule that a verdict once found ought to stand is not one which is applicable only to a verdict for the plaintiff, nor to a verdict against a corporation; it is one

which ought to be applied impartially, and it is one which seems to me entirely applicable to this case.

After a very full trial, and after a very comprehensive charge, the case went to the jury without any sort of objection from anyone, in any respect. No one then thought that there was any misdirection, or want of proper direction, or any ambiguity, or doubt, in, or arising out of, the charge in any respect; and in that I cannot but think everyone was then right.

If there had been any misdirection, or want of proper direction, that would not entitle the plaintiff to a new trial, because no objection was made at the proper time, and when, if made, it might have been corrected; so that a new trial, as of right, is out of the question.

This Court may, of course, notwithstanding such want of objection, grant a new trial, but that is, and must in the interests of the proper administration of justice and having regard to the respective functions of Court and jury, be a rare occurrence, based upon some plain miscarriage, or probable miscarriage, in some essential respect.

There was, in my opinion, nothing of that character in this case, nor, indeed, any ground for granting a new trial, even if objection had been duly taken to the charge.

Each act of alleged negligence relied upon by the plaintiff was clearly and fully left to the jury, and there was nothing like a suggestion that if they found against the defendants in respect of any one of them they need not find as to the others; if there had been, objection to the charge would immediately have been made. Any such ground of complaint is merely an afterthought, which requires perversion of the fact, and a stultification of those having the conduct of the plaintiff's case throughout, to give it any sort of a foundation. Not only did the learned trial Judge set forth—clearly set forth—the three grounds upon which the plaintiff's claim was rested, but he also, in the plainest words, told the jury that any one or all of them they might find in the plaintiff's favour.

In most of such cases as this the plaintiff's contention is based upon the obviously fallacious ground that the jury must "negative" all acts of negligence relied upon by him except that which they have found in his favour. Their duty is to find only

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the proximate cause of the injury; all other acts of negligence, no matter how plain or how gross, are immaterial, and therefore subjects with which the jury, in their verdict, are not concerned. It was not necessary, and it would have been improper, for the jury to have found upon any question of negligence which they found was not the proximate cause of the injury. Having found that the proximate cause of the injury was the want of the notice, other causes, if any, not proximate, were immaterial.

To have told the jury that, if they found the proximate cause of the injury to have been but one of the three grounds of negligence alleged, they had better add another for fear that one might not hold water, could hardly have been right; and yet that is really what, in many of these cases, is desired, and that towards which, in some charges, there seems to be in these days a drifting.

Looking for anything like a miscarriage of justice in this case, one meets with the opposite of that. The charge of the learned Judge and the findings of the jury seem to me unexceptionable. To have found for the plaintiff on any of the other grounds would have been to have found against the weight of the evidence and contrary to that learned Judge's firm views.

That the want of the notice was not actionable negligence I have no sort of doubt. The closing of the door as a means of ingress was not the act of the defendants; it was done under compulsion of the law, and the blame, if any in law, for the absence of a notice is attributable to those who compelled the closing of the door without requiring the notice. The defendants fully complied with their order.

I would allow the appeal.

MOSS, C.J.O. and MACLAREN, J.A., concurred.

G. F. H.

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[BRITTON, J.]

CLISDELL V. KINGSTON AND PEMBROKE R.W. CO.

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March 4.

*Railway—Carriage of Goods—Delivery to Consignee—Seizure by Railway Company for Unpaid Tolls—Dominion Railway Act, sec. 345—"Seize"—Termination of Carrier's Lien—Demand—Conversion—Damages.*

By sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc.:—

*Held*, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.

*Seem*, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.

*Held*, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods.

THIS action was brought by the plaintiff, as liquidator of the Wilbur Iron Ore Company Limited, against the defendants, to recover damages for the removal by the defendants of a quantity of coal from the premises of the Wilbur company, and the conversion of it to their (the defendants') own use. The facts are stated in the judgment.

The action was tried before BRITTON, J., without a jury, at Toronto, on the 22nd February, 1909.

A. W. Holmested, for the plaintiff.

I. F. Hellmuth, K.C., for the defendants.

MARCH 4. BRITTON, J.:—The defendants, as carriers, had carried coal for and delivered the same to the Wilbur Iron Ore Company Limited, in large quantities and at different times. On the 10th, 13th, and 15th August last the defendants carried coal in four cars in all, and on these days delivered that coal to the company named, upon their own property. Upon this coal so delivered the tolls and freight charges had not been paid. The coal was in a pile called a "stock" pile.

On the 31st August the defendants, about six o'clock in the afternoon, took possession of coal from that pile, intending to take,



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and taking so far as it could be identified, coal that had been carried by the defendants on the 10th, 13th, and 15th August named.

An order for the winding-up of the Wilbur Iron Ore Company Limited was made on the 26th August, 1908, and the plaintiff was on that day appointed liquidator.

It was admitted at the trial that the quantity of coal taken by the defendants was 138 1/10 tons. It was also admitted that the tolls and freight and other charges due the defendants, and unpaid prior to and on the 26th August, 1908, upon the coal taken and upon coal that had been consumed by the Wilbur company, carried on the days mentioned, amounted to \$568.25.

The defendants made reasonable efforts to sell the coal so taken, and failed, and, as the cars in which the coal was placed were required, the coal was mixed with the defendants' own coal and used by the defendants for their own purposes.

The defendants assert a statutory right to follow and seize the coal in question under sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

Section 344: "In case of refusal or neglect of payment on demand of any lawful tolls or any part thereof, the same shall be recoverable in any court of competent jurisdiction."

Section 345: "The company may, instead of proceeding as aforesaid for the recovery of such tolls, seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime such goods shall be at the risk of the owners thereof.

"2. If the tolls are not paid within six weeks, and, where the goods are perishable goods, if the tolls are not paid upon demand, or such goods are liable to perish while in possession of the company by reason of delay in payment or taking delivery by the consignee, the company may advertise and sell the whole or any part of such goods, and, out of the money arising from such sale, retain the tolls payable and all reasonable charges and expenses of such seizure, detention and sale.

"3. The company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto."

This section 345 first appeared, in substance, as sec. 234 of 51 Vict. ch. 29. There power was given to the agents or servants of the company to seize the goods, etc. It was, in a slightly changed form, re-enacted as sec. 280 of ch. 58, 3 Edw. VII. (1903).

The word "seize" is relied upon by the defendants. That word does not appear in the corresponding section of the English Act, viz., sec. 97, 8 Vict. ch. 20 (1845).

I am unable to agree with the defendants' contention that, by virtue of the word "seize," they are virtually given a lien on property carried, to such an extent and of so general and wide an application as to allow them to retake goods which have been delivered and as to which the ordinary carrier's lien has terminated. The word "seize," in practice, generally means "taking possession of the property of a person condemned by the judgment of some tribunal"—see Bouvier's Law Dict.—or, taking possession of property pending a trial or an adjudication in reference to something which might result in the property being liable, should the adjudication be adverse to the owner. It usually implies force. The ordinary meaning is "to take possession of"—"to lay hold of." Generally a seizure is made under a writ or warrant or authority or process specially issued in particular cases provided for by law.

The section under consideration does nothing more, in my opinion, than confirm and establish the carrier's lien. If, while that lien exists and can be enforced, there is, from the circumstances, any condition that renders a seizure necessary, it may be made; if not, there remains the right to detain and dispose of the goods as provided by the section. If the defendants are right, the startling result would be that, without warrant or claim in Court, or legal process, they could follow the goods carried and take them wherever found and at any time after the delivery to the consignee, so long as the goods retained their original character and could be identified, no matter how long after the delivery—subject possibly to the right of a *bonâ fide* purchaser for value without notice, and so long as the claim as to time would not be barred by the Statute of Limitations. It was not the intention of the Act that there should be any such result. The section was not intended to give the right to seize, where the lien has ceased. There is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee, as there was in this case. If the defendants had deposited the coal upon the land of the Wilbur Iron Ore Company under an express agreement, or under circumstances from which an agreement could be implied, that it was still liable for the tolls, and that

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the defendants' lien was not at an end—that it was still within the grasp of the defendants—the seizure might be maintained. I do not say that the word “seize,” or “seizure,” is not applicable to property in the possession of the carrier. Again, in the case of a carrier having brought goods to their destination, who, being ready to deliver, demands payment of tolls, and pending payment delivers the goods to the consignee subject to such payment, if the tolls are not paid on such demand, the goods carried could be seized, could be retaken and detained. In such a case there would be no abandonment of the lien. The goods would thereafter be held and dealt with by the carrier at the risk of the owner.

Apart from the right to seize upon which this case turns, the rights of carriers as to lien are dealt with in the very recent case of *Lord v. Great Eastern R.W. Co.*, [1908] 1 K.B. 195, [1908] 2 K.B. 54, [1909] A.C. 109.

In the present case the defendants did not proceed to sell the coal, or any part of it, as required by sec. 345. They endeavoured to sell it, and, failing, put it upon their own coal pile, mixed it with their own coal, used a part of it, and intend to use it all. They had no right to do this. This coal, in addition to charges for freight for carriage by the defendants, was liable for freight on other roads and for duty, before it was taken possession of by the defendants. The defendants assumed to seize for the entire amount, including these back charges, and amounting in all to about \$700.

It was objected that “tolls,” as defined by the Railway Act, sec. 3, sub-sec. 30, does not include “duty” or charges for transportation before the coal was received by the defendants. That point is important in justifying a distress. Section 344 requires a demand. If, on demand, there is a refusal to pay, the company may sue, or, instead of suing, they may (under sec. 345) seize. Demand of a gross sum, which includes a sum for tolls not separately stated, will not justify a distress: *Field v. Newport, etc., R.W. Co.* (1858), 27 L.J. Ex. 396. Presentation of a bill which had been given for carriage of goods, and which had been dishonoured, was held not to be a sufficient demand to justify distress: *North v. London and South Western R.W. Co.* (1863), 14 C.B.N.S. 132.

The admissions in this case do not include one that a formal or sufficient demand was made, and the evidence does not establish

it. The seizure was made under the direction of the solicitor of the defendants, who was present and directed it. He did not know of the issuance of the winding-up order until after the taking of the coal and loading it upon the cars of the defendants. He was advised of it before the removal of the cars from the siding of the Wilbur company. That, in my opinion, is not material. The defendants did know, before starting to take the coal, of the insolvency in fact of the Wilbur Iron Ore Company.

I find that the defendants did not have the consent of the plaintiff or of the said Wilbur Iron Ore Company to take the coal. The defendants are liable, and the measure of damages is the value of the coal. The Wilbur company being insolvent, and being wound up, had no use for the coal for working purposes. Its fair value at the place where and when taken was \$3.25 a ton. The quantity being admitted as 138 1/10 tons makes the amount for which the defendants are liable \$448.83. I do not allow interest.

The action is for tort. The defendants are not entitled to set off their claim against the liquidator. They will, no doubt, prove against the company in winding-up proceedings.

Judgment for the plaintiff for \$448.83 with costs.

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## [DIVISIONAL COURT.]

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MENZIES V. FARNON.

Feb. 22  
March 23.

*Husband and Wife—Marriage—Action for Declaration of Invalidity—R.S.O. 1897, ch. 162, sec. 31—Motion for Judgment in Default of Defence—Suspicion of Collusion—Trial in Open Court—Oral Evidence.*

The plaintiff, a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. The action invoked the jurisdiction conferred by sec. 31 of R.S.O. 1897, ch. 162, as added by 7 Edw. VII. ch. 23, sec. 8 (O.), and by the statement of claim the plaintiff alleged such facts as brought her claim within that enactment. The defendant did not appear or defend, and the plaintiff moved for judgment upon the statement of claim, supported by affidavits of herself, her mother, and the defendant. The defendant stated that he procured a marriage license without obtaining the consent of either of the plaintiff's parents; and it was shewn by a certificate that the return of the marriage contained the information that the plaintiff was then 18 years of age:—

*Held*, that, in the circumstances, the motion for judgment was properly refused, and the plaintiff left to proceed to trial in the ordinary way.

*Per* RIDDELL, J.:—No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, *coram populo*, by *vivâ voce* evidence. Judgment of Teetzel, J., affirmed.

MOTION by the plaintiff for judgment upon the statement of claim, in default of appearance and defence, in an action for a declaration of the invalidity of a marriage.

The facts are stated in the judgment of TEETZEL, J., by whom, sitting in the Weekly Court, the motion was heard, on the 9th February, 1909.

*Harcourt Ferguson*, for the plaintiff.

No one appeared for the defendant.

February 22. TEETZEL, J.:—The action is brought under the provisions of sec. 8 of 7 Edw. VII. ch. 23 (O.), adding the following to R.S.O. 1897, ch. 162:—

“31. (1) In case a form of marriage shall be gone through between two persons, either one of whom is under the age of 18 years, without the consent required by section 15 of this Act, the High Court of Justice shall have jurisdiction and power, notwithstanding that a license or certificate was granted and that the ceremony was performed by a person authorised by law to solemnise marriage, in an action brought by either party who was at the time

of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into.

“(2) Provided that such persons have not after the ceremony cohabited or lived together as man and wife, and that such action shall be brought before the person bringing it has attained the age of 19 years.

“Nothing herein contained shall affect the excepted cases mentioned in section 16 of this Act or apply where after the ceremony there has occurred that which, if a valid marriage had taken place, would have been a consummation of the marriage.

“(4) The High Court of Justice shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony.”

Section 15 of R.S.O. 1897, ch. 162, provides that where, in case of an intended marriage, either of the parties thereto (not being a widower or widow) is under the age of 18 years, the consent of the father of such party, if the father be living, or, if the father be dead, the consent of the mother, if living, or of a guardian, if any has been duly appointed, shall be required before the license is issued. And sub-sec. 2 provides that where such consent is necessary, the license shall not issue without the production of the consent, and that the issuer shall satisfy himself of the genuineness of the consent by satisfactory proof in addition to the affidavit required of one of the parties.

The plaintiff brings the action by her mother as next friend, and in her statement of claim alleges, among other things, that without the consent or knowledge of either of her parents, on the 17th July, 1906, being then only 15 years of age, she went with the defendant through a marriage ceremony before a minister (now deceased) of an English church in the city of Toronto; that immediately after the ceremony she left the defendant and went home to her mother and remained with her mother continuously until the next day, when she went to England, where she now resides; that the plaintiff and defendant have not cohabited or lived together as man and wife, nor have they seen one another since they parted immediately after the ceremony; and that since the ceremony nothing has occurred which, if a valid marriage had taken place, would have been a consummation of the marriage, and neither before nor after the ceremony did carnal intercourse

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take place between the parties; and she prays a declaration that the ceremony gone through between her and the defendant did not constitute a valid marriage.

The defendant did not enter an appearance, but was served with the statement of claim.

The statement of claim purports to be verified by affidavits of the plaintiff and the mother; and an affidavit of the defendant is also filed, in which he says that he procured a marriage license and went through the ceremony with the plaintiff, as alleged by her; that he did not obtain the consent of either of the parents of the plaintiff; and that, so far as he is aware, the plaintiff was married without the consent or knowledge of either of her parents; and also that the plaintiff and he have not cohabited together at any time, nor has any carnal intercourse taken place between them; and he also adds in his affidavit that he is desirous that a decree shall be granted nullifying the marriage between the plaintiff and himself.

According to the certificate of the Deputy Registrar-General, the entry return of the marriage made under the Act contained the information that the defendant was 24 years of age, and that the plaintiff was 18 years of age. Assuming that the defendant knew that the plaintiff was much younger, and within the age requiring consent of parents, he would be indictable for perjury in making the affidavit without which he could not have obtained the license.

The fact that the defendant failed to enter an appearance, followed by furnishing the plaintiff's solicitors with his affidavit to aid the plaintiff in obtaining judgment, seems to me evidence of collusion, which, if established, constitutes a bar to the plaintiff's relief, assuming that the principles followed in England under the Matrimonial Causes Act, 1857, would be adopted in this country in cases under sec. 31 above quoted. See *Churchward v. Churchward*, [1895] P. 7.

I do not purpose disposing of the motion upon that ground, but upon the ground that I think the circumstances disclosed in evidence in this case are such that the action should not be disposed of upon affidavits, but should be set down for trial as an undefended issue, and the necessary material to bring it within the Act should be adduced by oral evidence in open Court.

Where a marriage has been solemnised, the law strongly pre-

sumes that all the legal requisites have been complied with, and the burden is cast upon the plaintiff, under the Act in question, to establish to the satisfaction of the Court five essential facts in order to obtain judgment declaring the marriage invalid: first, that the plaintiff was at the time of the marriage under the age of 18 years; secondly, that the consent required by sec. 15 of the Act was not given; thirdly, that the plaintiff and defendant have not since the ceremony cohabited and lived together; fourthly, that when the plaintiff brought the action she had not attained the age of 19 years; and fifthly, that carnal intercourse did not take place between the parties, either before or after the ceremony.

In refusing this application, I do not assume to lay down any general practice in such cases, but I should think that it would be only in a case where the essentials required by the statute were clearly established, and all evidence of collusion negatived, that judgment should be awarded on affidavit evidence alone.

I think it is to be regretted that the statute has not made some provision for the appointment of a public officer having similar jurisdiction in such cases to that of the King's proctor in England, under the Matrimonial Causes Acts of 1857 and 1860.

By sec. 5 of the last named Act it is provided that "in every case of a petition for dissolution of a marriage it shall be lawful for the Court, if it shall see fit, to direct the necessary papers in the matter to be sent to His Majesty's proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter which the Court may deem it necessary or expedient to have fully argued," etc.

Where, as in this case, the defendant has committed a fraud upon the marriage laws of the country, if the plaintiff's allegations are true, it seems to me that there should be provision for intervention by some public official to see that the provisions of the relieving Act are not abused, and to avoid the possibility of judgment being obtained by collusion of the parties.

An action of this kind is not only a matter in which the parties themselves are interested, but the public has an interest not only in preventing violations of the Act respecting the solemnisation of marriage, but also in keeping all cases where relief is sought within the strict limitations of sec. 31.

The motion will, therefore, be refused, without prejudice to the plaintiff setting the action down for hearing in the usual way.

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The plaintiff appealed from the order of TEETZEL, J., and the appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 5th March, 1909.

*Harcourt Ferguson*, for the plaintiff.

No one appeared for the defendant.

March 23. FALCONBRIDGE, C.J.:—Without binding myself by saying that under no circumstances would I pronounce a judgment of this nature *in camerâ* and without evidence *vivâ voce*, I think my brother Teetzel was quite right in the view which he took of this particular case.

Appeal dismissed.

BRITTON, J.:—I am not prepared to differ from the learned Judge before whom the application for judgment was heard, and so I agree to the dismissal of the appeal.

Speaking for myself, I do not hold that this plaintiff, or any plaintiff, in prosecuting an action of this kind, is bound to prove by *vivâ voce* testimony, in open Court, all the facts and circumstances which are necessary to entitle the plaintiff to relief.

It is of course of the highest importance that there should be no doubt of the truth of the material allegations, and it should clearly appear that there is no collusion between the parties. It is not necessarily collusion, or even evidence of it, that the defendant omits to put in a statement of defence, or that he makes an affidavit verifying the allegations in the plaintiff's statement of claim. It is necessary, I think, to say this, to prevent the argument being presented to the trial Judge that it is in any event absolutely necessary that the plaintiff and her mother, either or both, come to Toronto and give *vivâ voce* evidence in open Court.

Section 31 of the Marriage Act, as added by sec. 8 of ch. 23, 7 Edw. VII., was enacted to give relief when the facts are as mentioned in that section and its sub-sections; sub-sec. 4 provides that where carnal intercourse has taken place between the parties, before the ceremony, the Court shall not be bound to grant the relief in the cases provided for by the section. The inference is that when the requisite facts are established in the way facts are established in any other ordinary case, and where no carnal intercourse has taken place between the parties, the Court is bound to grant the relief.

The subject matter of this action is of importance to the public, and I agree that it is better to have the case called in open Court, and, if the facts are established by evidence *vivâ voce* in open Court, or by evidence taken under commission, or in any way as in any other case properly before the Court, to have there made the declaration and adjudication that a valid marriage was not effected or entered into.

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RIDDELL, J.:—The Rules relied upon by the appellant are Con. Rules 586, 593, the argument being that, as there is no statement of defence delivered, the allegations of fact in the statement of claim must be taken as true and such facts entitle the plaintiff to the relief sought.

But this reasoning has two defects at least: first, the non-delivery of a statement of defence is not made proof in fact of the allegations in the statement of claim, but only the equivalent of an admission by the defendant of the truth of such allegations; second, Con. Rule 593 does not entitle the plaintiff to any particular relief *ex debito justitiæ*, but only to "such judgment . . . as the Court may consider the plaintiff . . . to be entitled to."

It is further to be noticed that even the admission which the defendant "shall be deemed" to make by non-delivery of a statement of defence is subject to the provision that this is subject to being modified or entirely abrogated by order of the Court or a Judge: Con. Rule 586.

It is not necessary in this case to discuss the question whether the Act giving the Court "jurisdiction and power" under certain circumstances "to declare and adjudge that a valid marriage was not effected or entered into" (7 Edw. VII. ch. 23, sec. 8), obliges the Court to exercise such power; no doubt, the Court would always exercise a jurisdiction and power given for the benefit of the public.

Assuming that the Court should exercise such power in a proper case, the inquiry arises whether the present comes within that category.

In strictness, upon a motion for judgment under Con. Rule 593, only the pleading may be looked at: *Smith v. Buchan* (1888), 36 W.R. 631; *Faithfull v. Woodley* (1889), 43 Ch.D. 287; but, assuming that affidavits may be looked at, I do not think the case is thereby advanced.

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As the learned Judge says, this is a matter affecting the public and not the parties alone—the Act was never intended to effect divorces, or to be applied in any but a case proved beyond any peradventure.

Here we have two persons of differing creeds, who at one time seem to have been fond of each other, but who have not seen each other for nearly three years. She swears she has ceased to care for him, and he swears “I do not care any more for her.” Add the fact that he must have sworn to what was untrue upon procuring the marriage license or some one must be swearing to what is untrue now; and the case appears at once as a most suspicious one.

The matter being one affecting public morality, I think that the Court would not be justified in considering the alleged facts as true. If necessary, an order might be made that the non-delivery of statement of defence should not be taken as an admission. But that is not necessary. Con. Rule 593 does not make it obligatory on the Court to pronounce judgment as asked: “The Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for:” *per* Lord Esher, M.R., in *Charles v. Shepherd*, [1892] 2 Q.B. 622, at p. 624. “I do not think that we are compelled to give judgment upon the statement of claim if we see that by so doing we should be dealing with the case in an improper manner:” *per* Wright, J., in *Baker v. Wadsworth* (1898), 67 L.J.Q.B. 301; see also *Jenney v. Mackintosh* (1889), 61 L.T.R. 108; *Verney v. Thomas* (1888), 36 W.R. 398 *ad fin.*

Without going so far as to say that no case could possibly arise for the exercise by the Court of this statutory power upon a motion for judgment, whether with or without affidavits, such a case must be an extraordinary one. No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, *coram populo*, by *vivâ voce* evidence, which evidence, unless and until provision be made for the representation of the people upon such trials, the trial Judge would, no doubt, test by searching cross-examination, and which,

in any event, he would have an opportunity of testing by seeing and hearing the witnesses.

The circumstances of the present case, as they are urged upon us, are not such as to take it out of this general rule. The plaintiff and her mother are said to be in England; no reason is assigned for their not coming to Toronto except their alleged poverty. We cannot very well make one rule for the poor and another for the rich, and witnesses are coming every day or so to Toronto at a greater expense.

I quite agree with my brother Teetzel's remarks as to the advisability of the appointment of a public officer having jurisdiction similar to that of the King's proctor in England under the Acts of 1857 and 1860.

The appeal should be dismissed.

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[DIVISIONAL COURT.]

QUART V. EAGER ET AL.

*Sale of Land—Recital—Covenant—Additional Consideration if Sold—Rule Against Perpetuities—Lien on Lands—Personal Remedy.*

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The plaintiff sold certain land to E. and S., the deed containing a recital that plaintiff had agreed for \$200 to sell the land to E. and S., their heirs and assigns, for railway purposes, with a proviso that the land should remain the absolute property, in the possession of, and under the absolute control of E. and S., and should not be fenced in otherwise than as provided in the deed; and in the event of E. and S. selling, etc., the land, or erecting a fence contrary to the terms of the deed, E. and S., or their heirs, executors, administrators or assigns, should immediately pay to the plaintiff, his executors, administrators or assigns, the further sum of \$500 as additional consideration for the sale of the land, making in all \$700 therefor. The land, in consideration of the payment of the \$200 and the further consideration of the several covenants to be kept and performed by E. and S., their heirs and assigns, was then conveyed to them. The covenant was in effect that E. and S., for themselves, their heirs and assigns, covenanted with the plaintiff that they, the said E. and S., or their heirs or assigns, would, in the event of their disposing of, or conveying the said land, immediately pay to the plaintiff the further sum of \$500. E. and S. sold and conveyed the land, with other lands, to the E. and S. company, subject, in express terms, to the covenants set out in the original deed; and the E. and S. company sold and conveyed the lands, with other lands, to the defendants, also subject to the covenants. In an action to recover \$500 for the breach of the covenant not to sell, claiming the payment of the \$500, a lien on the lands, and a personal remedy against the defendants:—



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*Held*, affirming the judgment of Boyd, C., at the trial (RIDDELL, J., dissenting), that the plaintiff was entitled to a lien on the land, and to a sale thereof to realize the lien, the rule against perpetuities not applying, for though under the covenant it might be held applicable, that was controlled by the recital; but, reversing the judgment, in so far as it gave a personal remedy against the defendants.

ACTION to recover \$500 and for the declaration and enforcement of a lien on land therefor, in the circumstances stated in the judgment.

The action was tried before BOYD, C., at Cornwall, on the 22nd April, 1908.

*D. B. Maclennan*, K.C., and *G. C. Hart*, for the plaintiff.

*R. A. Pringle*, K.C., and *J. A. C. Cameron*, for the defendants.

April 27. BOYD, C.:—By conveyance of October, 1901, the land in question, 30 feet in width, is conveyed by Quart, the plaintiff, to Daniel Eager and Thomas Sanderson, for \$200, with the proviso that if the land is fenced in a manner forbidden, or in the event of its being sold, leased, or otherwise disposed of, a further sum of \$500 cash, as additional consideration, shall be paid, making \$700 in all. This strip was sold as an entrance for railway purposes to a mill property, and evidence was given that the plaintiff had confidence that the original purchasers would not use it so as to be a source of trouble or annoyance to him, and so reduced the price on the above conditions.

Eager and Sanderson sold this land, with other portions, in July, 1903, to the Eager and Sanderson Company, by conveyance made subject in express terms to the stipulations, covenants, and conditions set out in the first deed of 1901.

The Eager and Sanderson Company sold and conveyed the strip in July, 1904, to William Eager and Richard Eager, the present defendants, and this was again made expressly subject to the original stipulations of the deed of 1901.

The plaintiff now asks for payment of the \$500, with a lien on the land, and personal judgment against the defendants.

The defence is, no privity of contract, and that the transaction sued on is void as being in restraint of alienation; and also, on the ground, that the conveyance of 1901 transgresses the rule as to perpetuities.

The scope of the covenant is the important part of the case.

I think the plaintiff's contention should prevail, that the breach of the covenant is limited to the joint action of the first purchasers, and therefore does not extend beyond their joint lives, and in this aspect offends against no rule of law. There is apparent inconsistency between the recital and the subsequent covenant in the deed, as will appear from their juxtaposition. The *recital* is that "in the event of the parties of the second part selling, leasing, or in any other way disposing of said land . . . the said parties of the second part, or their heirs, executors, etc., are to immediately pay or cause to be paid to the party of the first part, or his heirs, executors, etc., the further sum of \$500." Whereas in the *covenant* there is an expansion, thus: "The parties of the second part, for themselves, their heirs, etc., covenant, promise, and agree to and with the party of the first part, his heirs, executors, etc., that they, the parties of the second part, or their heirs or assigns, will, in the event of their disposing of or conveying the said land . . . pay or cause to be paid to the party of the first part . . . the further sum of \$500." The words "in the event of *their* disposing of or conveying the said land" may mean either a personal disposition by the contracting parties, or a disposal by their heirs, executors, administrators, or assigns. The latter reading would involve an indefinite extension of time—would amount to a perpetuity, and would frustrate the agreement as to further consideration being paid. The former construction is harmonious with the recital, and gives a good right of action for the breach committed by the first purchasers when they sold in 1903. The cases shew that the generality of later words in the covenants or operative parts may be modified, explained, or restricted by the precise and clear language of the recital: see *Re Neal's Trusts* (1857), 4 Jur. N.S. 6, *per* Wood, V.-C., cited in Norton on Deeds (1906), p. 187, and *Ex p. Dawes* (1886), 17 Q.B.D. 275.

In the result, the \$500 becomes part of the consideration, and, if unpaid, forms a lien on the land.

The covenant to pay the extra price relates to, touches, and runs with the land; and, besides, the defendants have notice of the terms of the agreement and the liability by virtue of the chain of registered conveyances under which they hold.

These things being so, I think the plaintiff should have judgment for a sale of the land to realize the lien, and also, if he desires, a

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personal order on the defendants to pay, with costs of suit and interest from date of writ.

By the terms of the conveyances, the defendants have a remedy over against the first purchasers, Eager and Sanderson, who committed the breach.

From this judgment the defendants appealed to the Divisional Court.

On June 17th, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., MACMAHON and RIDDELL, JJ.

*E. D. Armour*, K.C., for the appellants.

*D. B. MacLennan*, K.C., for the respondents.

The arguments sufficiently appear from the judgments.

October 10. FALCONBRIDGE, C.J.:—The authorities cited by the Chancellor—*Re Neal's Trusts*, 4 Jur. N.S. 6; Norton on Deeds, 187; and *Ex p. Dawes*, 17 Q.B.D. 275—lay down the rule that where the operative part of a deed appears to be intended to follow, but does not accurately follow, the words of a recital, the effect of the operative part will be controlled by the recital.

The "further sum of \$500" is clearly stated in the first recital in the deed of the 7th October, 1901, to be "an additional consideration for said land."

And I think the Chancellor was right in holding the \$500 to be part of the consideration, and as it has never been paid it forms a lien on the land.

On this short ground the judgment ought to be upheld, in so far as it declares the plaintiff to be entitled to a lien on the land. I agree with my brother Riddell in thinking that the personal judgment against the defendant cannot be sustained.

Paragraph 7 of the judgment is admittedly a mere nullity.

The formal judgment will be amended by striking out paragraphs 2 and 7, and will be in other respects affirmed.

There will be no costs of this appeal.

MACMAHON, J., concurred with FALCONBRIDGE, C.J.

RIDDELL, J.:—In the view I take of the case, and in view of the manner in which it was presented, it will be necessary to set out rather more at length the facts.

The plaintiff is a yeoman of Winchester village, and owns certain lands in the township of Winchester. Messrs. Daniel Eager and Thomas J. Sanderson were millers in the same village, who were “handicapped in getting their stuff into the mill,” as the plaintiff expresses it. They seem to have been desirous of having a spur line built from the line of the Canadian Pacific Railway into their mill, and Daniel Eager, one of them, after “quite a long persuasion,” induced the plaintiff to sell to the milling firm for that purpose a strip of land 30 feet in width across his farm, dividing it in two. The land was worth about \$100 an acre, and containing  $1\frac{49}{100}$ ths of an acre, was rather less than half a mile long. The owner and Daniel Eager were friends, and the former had confidence that his friend would injure him as little as possible by the operation of the spur line to be built.

On the 7th October, 1901, the plaintiff and the members of the milling firm executed a deed, which first recited that the plaintiff is “the owner in fee of the south-east quarter of lot 4, con. 6, Winchester township, and has agreed to sell to the parties of the second part (Eager and Sanderson), their heirs and assigns, for railroad purposes only, 30 feet in width of the westerly side or portion of the said south-east quarter of said lot, extending from front to rear thereof, for the sum of \$200 cash, providing the said 30 feet of land remains the absolute property of, in the possession of, and under the absolute control of, the said parties of the second part, and also provided the said land is not fenced on either side thereof as at present, except upon the west side, opposite one A.B.’s property, and that in the event of the said parties of the second part selling, leasing, or in any other way conveying or disposing of the said land, either for railway or any other purpose whatsoever, or upon the said parties of the second part putting up or erecting a fence of any kind, nature or description upon either side of said land, or upon both sides thereof, then, upon the taking place of any one of the aforesaid events, the said parties of the second part, or their heirs, executors, administrators or assigns, are to immediately pay or cause to be paid to the said party of the first part or his heirs, executors, administrators or assigns, the further sum of \$500 cash as additional consideration for said land, making in all \$700 therefor.”

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A recital follows as to the liability of the grantees and their assigns for loss and damage from stock or other property of the plaintiff, crossing or being upon the 30-foot strip; and another in reference to railway gates to be put up and maintained by the grantees, their heirs and assigns; and also a crossing.

After a recital of the agreement of the parties to sell and buy "upon the aforesaid terms and conditions, and also upon the further conditions hereinafter mentioned and described, etc.," the document proceeds: "Now this indenture witnesseth that in consideration of the sum of \$200 of lawful money of Canada now paid by the said parties of the second part to the said party of the first part, the receipt whereof is hereby by him acknowledged, and in further consideration of the several covenants, promises and stipulations hereinafter set forth to be kept, done and performed by the said parties of the second part, or their heirs and assigns, he, the said party of the first part, doth grant and convey unto the said parties of the second part, their heirs, executors, administrators and assigns, for ever, all and singular, etc. . . ."

To have and to hold unto the said parties of the second part, their heirs and assigns, to and for their sole and only use forever, subject "to Crown grant conditions, and taxes, and also subject to the following covenants, provisoes, conditions and stipulations, namely: The said parties of the second part, for themselves, their heirs, executors, administrators or assigns, covenant, promise and agree," etc., etc., "that they, the said parties of the second part, or their heirs or assigns, will, in the event of their disposing or conveying said land by selling, leasing, or in any other way conveying or disposing thereof, either for railway purposes or any other purpose whatever; or upon the said parties of the second part, or their heirs, executors, administrators or assigns, constructing, building, putting up or erecting a fence of any kind or description upon any or either or upon both sides of said strip of land so used for railway purposes, or otherwise excepting," etc., "and immediately pay or cause to be paid to the said party of the first part, or his heirs, executors, administrators or assigns, the further sum of \$500 cash as an additional consideration of said land, making in all therefor the sum of \$700."

Then follows a covenant by the party of the second part for themselves, their heirs and assigns, not to build, construct or put

up a fence, etc., "without first obtaining the consent of the party of the first part, or his heirs or assigns, in writing so to do, and upon their paying the aforesaid sum of \$500 as additional consideration forthwith to the said party of the first part, or his heirs, executors, administrators and assigns."

Then follows a covenant by the parties of the second part for themselves, their heirs, executors, administrators and assigns, while constructing the spur line, to build a crossing and repair and maintain it. Then a similar covenant to build and maintain the four gates and to pay all loss and damage by reason of the gates being left open by the parties of the second part, or any other person. Then follow the usual vendor's covenants.

There is no covenant not to sell or dispose or lose possession of the property. The spur line seems to have been built and operated for a time by horse power, subsequently by the Canadian Pacific Railway engines.

In 1903, July 4th, the grantees in the former deed conveyed to Eager and Sanderson Company, Limited, the said land (with other land), "subject, nevertheless, to a certain number of covenants, provisoes, conditions and stipulations fully set out and laid down" in the former deed, "to be observed, performed and fully carried by the said party of the first part" (E. and S.), "their heirs, executors, administrators and assigns." The grantees "covenant, promise and agree . . . that they . . . will do, fully carry out and perform every and all reservations, limitations, provisoes, conditions, stipulations and agreements expressed and implied in said 'conveyance,' and will indemnify the grantors," etc.

In 1904, July 18th, the company convey to William Eager and Richard Eager, the defendants in this action, this land (with other lands), "to have and to hold," etc., "subject, nevertheless, to the reservations," etc., "in the Crown grant, and subject also to the terms and conditions contained in the said siding agreement," which seems, from the earlier part of the deed, to be an agreement for siding made with the Canadian Pacific Railway. There is no covenant by the grantees.

The Chancellor held that the \$500 was secured by a lien upon the land, that the covenant to pay this sum ran with the land, and that therefore these defendants are personally liable in addition to the land being charged.

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Apparently through a misapprehension of the terms of the conveyances, the learned Chancellor added: "By the terms of the conveyances, the defendants have a remedy over against the first purchasers, Eager and Sanderson, who committed the breach." Taking advantage of this *obiter dictum*, the plaintiff, in taking out his judgment for \$509.18 and \$222.28 costs, seeks a declaration of his right to a lien and provision for enforcing same by sale had a further clause added: "That the . . . defendants . . . recover . . . the sum of \$509.18 and taxed costs of the plaintiff by way of indemnity and relief over against the said Daniel Eager and Thomas Sanderson." These were not parties to the action, and of course no such clause should have been inserted, or was intended by the learned trial Judge to be inserted in the judgment. The appeal must in any event be allowed to that extent; and even should the plaintiff succeed in the main, this circumstance alone should deprive him of costs.

In addition to the grounds upon which the decision is put by the Chancellor, it was argued before us that the mere fact of taking a conveyance of land subject to an encumbrance obligated the grantee to pay off the encumbrance and this *a fortiori* if there were a covenant to indemnify the grantor.

The bald proposition first set out is, of course, based upon *Waring v. Ward* (1802), 7 Ves. 332, and like cases; but whatever may be the rights as between grantor and grantee, there can be no doubt that the encumbrancer cannot take advantage of the equitable right to indemnify (if it exist) and bring his action against the grantee directly: *Walker v. Dickson* (1892), 20 A.R. 96. If there be an express covenant on the part of the grantee with the grantor, the case is not advanced. The doctrine, supposed to be an equitable one, that if A. promise B. that he (A.) will pay to C. B.'s debt to C., then C. can sue A. for the same, is not tenable. Some discussion of this heresy will be found in *Kendrick v. Barkey* (1907), 9 O.W.R. 356, at pp. 358 *et seq.*

Nowadays the difficulty is got over by the original creditor taking from the new grantor an assignment of his rights against the grantee: *British Canadian Loan Co. v. Tear* (1893), 23 O.R. 664; *Stewart v. Stratford Hotel Co.* (1908), 12 O.W.R. 157. It may be noticed, also, that in the conveyance to these defendants they do not covenant to indemnify their grantors or anyone, and the con-

veyance is not even subject to the conditions, etc., of the original deed from Quart.

And the stringent rule of *Carter v. Carter* (1879), 26 Gr. 232, in which Blake, V.-C., held that if there is a devise of land subject to the payment of an annuity, and the devisee accepts the devise, he will be held to have assumed a personal liability to pay the amount, has never been extended to the case of a grantee.

The only ground upon which the personal judgment against these defendants can be supported—if at all—is that upon which it is put by the Chancellor, that is, the covenant by the original parties, this being held to run with the land.

I am unable to see in what way the payment of part of the consideration can be said to touch or concern the land conveyed: it is not like the rent, which, in the theory of the law, issues out of the land demised—though even as to rent: see *Milnes v. Branch* (1816), 5 M. & S. 411. It is much of the nature of a covenant on the part of the lessor to pay on a valuation for trees planted by the lessee: *Grey v. Cuthbertson* (1785), 4 Doug. 351 (although in that case, indeed, the breach was the refusal to name an arbitrator to fix the value of the trees or to pay for improvements); *Gorten v. Gregory* (1862), 3 B. & S. 90; or by lessee to pay, in addition to the rent, 10 per cent. on the outlay the lessee should make in improvements of the building: *Lambert v. Norris* (1837), 2 M. & W. 333; *Hoby v. Roebuck* (1816), 7 Taunt. 157; *Donellan v. Read* (1832), 3 B. & Ad. 899; *Martyn v. Clue* (1852), 18 Q.B. 611. See also *Webb v. Russell* (1789), 3 T.R. 392, 398; *Stokes v. Russell* (1790), 3 T.R. 678; *Russell v. Stokes* (1791), 1 H. Bl. 562.

Such covenants have been held to be merely personal between the covenanting parties, and not to bind the assignees, even if named.

I do not press the point here that the original grantees did not even in form bind their assigns to pay, the covenant reading that they “for themselves, their executors, administrators or assigns, covenant, etc.” Nor do I enter into the larger inquiry whether, except in the case of landlord and tenant, the burden of a covenant can run with the land. This has been very fully considered by the Court of Appeal in *Austerberry v. Corporation of Oldham* (1885), 29 Ch.D. 750. All the cases theretofore were examined, and while the Court did not absolutely decide that this principle was con-

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fined to the case of landlord and tenant, they in effect made its quietus for the proposition that it extended beyond.

In that case A. sold a piece of land to B. as part of the site of a road intended to be built and maintained. B. covenanted with A., his heirs and assigns, that he, his heirs and assigns, would make the road and keep it in repair. This land was bounded on both sides by other lands of A. A. sold to the plaintiff, B. to the defendants, both with notice of the covenant. It was held by the Court of Appeal, affirming the Vice-Chancellor of Lancaster, that the plaintiff could not enforce the covenant against the defendant, as the covenant did and could not run with the land. Upon the equitable doctrine that a person who takes with notice of a covenant is bound by it being appealed to—(and Rigby, L.J., in *Rogers v. Hosegood*, [1900] 2 Ch. 388, at p. 401, says: “I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it”), —the Court held that the said equitable doctrine, established as it is by *Tulk v. Moxhay* (1848), 2 Ph. 774, applies only to restrictive covenants, i.e., covenants restricting to mode of using the land, as indeed had already been held in *Haywood v. Brunswick Permanent Benefit Building Society* (1881), 8 Q.B.D. 403, and *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch.D. 562. In my opinion there is no ground upon which the personal judgment can be sustained, and the appeal in that regard also should be allowed.

The more difficult question remains as to the lien. Evidence was admitted by the Chancellor at the trial as to the circumstances surrounding the making of the deed, and I think rightly.

*Frail v. Ellis* (1852), 16 Beav. 350. It is a very old head of equity that if the purchase money or any part of it is unpaid, and the vendor gives possession, he will have a lien on the estate for the unpaid purchase money. This principle, which is said to be “a natural equity,” was laid down by the Court of Chancery at least as early as 1684, when the Lord Keeper, Sir Francis North, Lord Guilford (who from having been Lord Chief Justice of the Common Pleas had been made Lord Keeper in 1682, and who dying in 1684 was succeeded by Lord Jefferies, so well known), expressly so decided in *Chapman v. Tanner* (1684), 1 Vern. 267.

This “lien is not in general discharged by the vendor taking

security for the purchase money by bond, bill or note, unless under circumstances clearly shewing that it was his intention to rely, not upon the security of the estate, but solely upon the personal credit of the purchaser:" Watson's Compendium of Equity, 2nd ed., p. 1172.

The rules for determining this question may be deduced from two well-known cases: *Parrott v. Sweetland* (1834), 3 M. & K. 655, and *Frail v. Ellis*, 16 Beav. 350. In the former case, Lord Commissioner Shadwell, in delivering the judgment of the Court (himself, the Vice-Chancellor, and Mr. Justice Bosanquet), says (in speaking of the question whether a lien is excluded), p. 664: "It is manifest that, in Lord Lyndhurst's opinion, the proper way of dealing with questions of this kind, is to look at the instruments executed by the parties at the time, and upon them to declare what the meaning of the parties must have been." In the latter Sir John Romilly, M.R., says, at p. 353: "I am of opinion, that the form of the deed does not conclude the parties . . . I am of opinion that in accordance with all the cases, it is possible for the parties to shew what the real nature of the contract was." Accordingly, the Master of the Rolls in that case allowed evidence which convinced him that the vendor executed the conveyance of the property on the faith and assurance that a mortgage deed to secure the balance money had been executed. This, he held, completely destroyed the effect of the deed executed at the time, which expressed that the consideration was £150 then paid, and the acceptance of the purchaser for £300 at three months at the same time delivered to the vendor, "the receipt whereof he did thereby respectively acknowledge, and that the same were in full satisfaction for the absolute purchase" of the property: see pp. 350, 353. It seems to have been considered that if some such evidence had not been given the form of the deed would be binding. As I understand the law, the form of the deed is what must alone be looked at to declare the intention of the parties, unless by some evidence *dehors* the deed the parties can shew that the real nature of the contract was different, and such evidence must be received and considered.

In the present case I cannot see that the parol evidence assists the plaintiff's position, but rather the reverse. Looking at the deed alone, the consideration is explicit: "The sum of \$200 . . . now paid . . . the receipt whereof is hereby . . . ac-

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knowledge, and in further consideration of the several covenants, promises and stipulations hereinafter set forth to be kept, done and performed by the said parties of the second part, or their heirs and assigns . . .” It seems to me that here the parties themselves have fixed the consideration as being part in cash and part in promise—not all in money—with a collateral agreement to pay such part thereof as may not yet have been paid.

If this conclusion is sound, no vendor's lien ever attached. And I do not think that the case of the plaintiff is advanced by the fact that in the recitals the sum of \$500 is spoken of as “additional consideration for said land, making in all \$700 therefor.” The covenant for payment has the same expression in effect, “as an additional consideration of said land, making in all therefor the sum of \$700.”

From an examination of the deed, together with (and perhaps without) a consideration of the circumstances surrounding the making of it, it seems manifest that \$200 was considered about the value of the land taken along with the detriment to the plaintiff, so long as the original grantees held the land themselves and used and operated the railway expected to be built in the manner the plaintiff thought they would, and did not fence it in. No doubt there was a good deal of talk about the manner in which the railway would be operated. Whether this was so or not, it seems to me obvious that the parties looked upon the \$200 as the price of the property. Then, to prevent the property being fenced, a covenant is taken that it shall not be fenced without written permission, and that if fenced \$500 shall be paid to the plaintiff. Can it be said that this \$500 is in reality part of the purchase price, the “purchase money”?

To prevent the grantees readily parting with, conveying or disposing of the property, it is provided that if they do so either they or their heirs or assigns must pay this same sum. The position of the sum if they should sell does not seem to me at all different from that of the same sum if they fence. And the fact that this sum is in either case called a “further consideration” does not advance matters one whit.

The ease with which, had the \$500 really been part of the purchase money, the deed might have been drawn to express the fact, assists perhaps in this conclusion. The argument in favour

of lien would be different had the conveyance read, "in consideration of the sum of \$700, payable \$200 forthwith and the remainder, \$500, upon the sale or other disposition of the land, or the fencing, etc., etc." Moreover, there is no provision for interest: had the real purchase money been \$700, it is not at all likely that the vendor would not have provided for interest. The payment to him of \$500 in five years is not the same as the payment of the same sum in ten years.

It seems to me that the sum of \$500 is a rough computation of the amount of damages the plaintiff would expect that he would or might suffer if the prohibited fencing were proceeded with (and this is helped out by the covenant in that regard), or by his friends losing control over the line of rail. It is a penalty or liquidated damages, but I think no part of the purchase money and no vendor's lien attaches.

I am not able to give effect to the argument based upon the supposed restraint on alienation. It is true that in the recitals there is recited a provision that the land remains "the absolute property, if in the possession and under the absolute control of the original grantees." But nothing of the kind appears in the operative part of the deed. There is no covenant by the grantees to that effect as there is in respect to fencing, and over and over again the assigns of the grantees are mentioned. This is not a restraint on alienation in the legal sense, but only a provision that if an alienation should take place a sum of money should be paid to the grantors.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

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KING V. TREANOR.

Dec. 4.

*Criminal Law—Railway Employees—Selling Liquor to—Offence Created by Both Provincial and Dominion Acts—Information under Ontario Act—Non-applicability to Employees of Dominion Railway—Non-applicability of Ontario Act—Knowledge by Barkeeper of the Employees being such.*

Where Acts have been passed by the Dominion Parliament and Provincial Legislature prohibiting an act, and an information is laid charging as an offence the commission of the prohibited act "contrary to the statute in such case made and provided," such information must be held, in the absence of a specific reference to the particular statute, to have been laid under that statute in which words are used to describe the elements of the offence.

An information charged that the defendant at, etc., did sell, give or barter spirituous or intoxicating liquors to a conductor and engineer on the Grand Trunk Railway, while actually employed in the course of their duty in connection with the operation of a train; and that such liquor was supplied by the defendant's barkeeper contrary to the form of the statute, following the wording of the Ontario Railway Act, 6 Edw. VII. ch. 30:—

*Held*, that the offence must be deemed to be one under the Ontario Act, and not under sec. 414 of the Dominion Railway Act; and as by sec. 3 of the Ontario Act such Act is restricted to railways within the jurisdiction of the Ontario Legislature, and the Grand Trunk Railway being under the jurisdiction of the Dominion Parliament, a conviction of the defendants for the alleged offence could not be supported.

*Seemle*, the fact of the men not being in uniform, and not known to the barkeeper to be railway employees, would not exculpate the defendant.

THIS was a motion to quash a conviction made on November 11th, 1908, by W. H. Kennedy and J. G. Harley, justices of the peace for the county of Halton, on the ground that the conviction was made under sec. 244 of the Ontario Railway Act, 1906, which is applicable only to railways within the legislative authority of the Province of Ontario; that the persons to whom the liquor was sold were employees of the Grand Trunk Railway Company, which is not within such authority, and the prohibition of the section mentioned had no application; that the employees were not known to be such by the vendor, and that neither the information nor the conviction disclosed any offence.

The facts are stated in the judgment.

On November 27th, 1908, the motion was heard before LATCHFORD, J., sitting in Chambers.

*J. Haverson*, K.C., for the motion.

*J. R. Cartwright*, K.C., for the Crown.

December 4. LATCHFORD, J.:—The information alleges that John Treanor, at the village of Georgetown, on the 2nd October, 1908, did sell, give or barter spirituous or intoxicating liquor to William Johnston, conductor, and Alexander Ross, engineer, of the Grand Trunk R.W. Co., while actually employed in the course of their duty in connection with the operation of a train, and that such liquor was supplied by his bar-tender, contrary to the form of the statute, etc.

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The evidence of the conductor shews that he was in charge of a freight train on the Grand Trunk Railway on the date mentioned, and was at Georgetown for an hour or two while his train lay there. He and Ross, one of his engineers, had liquor at the defendant's hotel. Neither was in uniform, nor was either man known to the defendant or his bar-tender.

There is a minute on the depositions that a fine of \$10 and costs—in all \$17.25—was imposed and, under protest, paid.

The conviction returned is not a conviction in form, but an order for payment of money, and in default imprisonment.. It follows Form 35, authorized by sec. 727 of the Criminal Code. R.S.C. 1906, ch. 146. It does not state that the defendant "is convicted," or that he is guilty.

Treating the order, however, as a conviction, and assuming that an express finding as to the fact of a conviction is unnecessary, but may be inferred from the imposition of a fine—as to which I express no opinion—the principal questions to be considered are whether the prosecution was under sec. 244 of the Ontario Railway Act or sec. 414 of the Dominion Railway Act, and whether the fact that the employees were not in uniform and were not known to the defendant or his bar-tender to be railway employees affects the liability of the defendant. On the latter point it is, I think, quite immaterial that the men were not in uniform or known to be railway employees. Under either statute such want of knowledge would not exculpate the defendant. The provisions of the statute may occasionally operate harshly upon one who gives or sells liquor to a railway employee; but a consideration paramount to such occasional harshness is the necessity that men in whom the utmost vigour of body and mind is essential to the safety of the public shall not have any faculty dulled by the use of intoxicants.

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The information follows the wording of sec. 244 of the Ontario Railway Act (6 Edw. VII. ch. 30), which is as follows:—

“Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any company, while actually employed in the course of his duty on a train or car or while in uniform or in connection with the operation of a train or car, is liable on summary conviction to a penalty not exceeding twenty-five dollars, or to imprisonment with or without hard labour for a period not exceeding one month, or to both.”

The information does not follow sec. 414 of the Dominion Railway Act, R.S.C. 1906, ch. 37, which reads:—

“Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any company, while on duty, is liable on summary conviction to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a period not exceeding one month, or to both.”

Where there are two statutes, one Provincial and the other Dominion, prohibiting an act, an information stating that an offence is “contrary to the statute in such case made and provided” must, in the absence of a specific reference to the statute, be held, I think, to be laid under the particular statute whose words are used in the information to describe the elements of the offence. In this case such words are the words of the Ontario and not of the Dominion Act, and the information must, in my opinion, be considered as laid under the Ontario statute. That Act is by sec. 3 thereof restricted to railways within the legislative authority of the Legislature of Ontario. The Grand Trunk Railway is not such a railway. The complaint which the defendant was called upon to answer was one for which he could not, upon the evidence, have been found guilty.

The conviction or order recites, it is true, a complaint embodying the words of the Dominion Act, but such recital is inaccurate, and does not affect the fact that the offence charged against the defendant was under a statute which had no application to what he may have been guilty of.

The conviction should be quashed, but, as the magistrates appear to have acted in good faith, without costs.

There will be the usual order for the protection of the magistrates.

[LATCHFORD, J.]

LISTER V. THE TOWNSHIP OF CLINTON.

1909

Feb. 22.

*Municipal Corporations—Road Allowance—Road Opened up in Lieu Thereof—No Compensation to Owners, but Original Road Allowance Taken by Them—Subsequent Intention to Abandon Road so Laid Out and Open up Original Road Allowance—Necessity of Compensation Therefor—Notice of Intention to Open up such Road Allowance—Sufficiency of.*

On a survey made in 1791, a road allowance was set out along the front of certain lots, which ran down to a lake. The road allowance, however, was not opened up, or used as a road, but some time prior to 1850 a road running along the lake shore, the land therefor being taken from these lots, was, as a matter of convenience, opened up and used in lieu of the original road allowance, and continued to be so used ever since, the township doing work and expending money thereon. No compensation was paid to the owners; but they took over and enclosed the road allowance as part of their lands, and occupied it for a period of some sixty years. In consequence of the waters of the lake encroaching on the lake roadway, it had, from time to time, to be moved back, these owners giving the lands for the purpose without any compensation. In 1908, by reason of the expense occasioned in keeping this road in repair, through the encroachment, the township council determined to open up the original road allowance, and served a notice on the owners of the lots stating that a by-law would be introduced for this purpose on a named day, but without making any offer of compensation:—

*Held*, that the notice was sufficient; for even if the time of the meeting should have been stated in the notice, as it appeared that the applicants had either attended the meeting, or were represented by counsel, and were heard before the by-law was passed, they were now precluded from objecting thereto.

*Held*, however, that as no compensation was paid for the lands originally taken for the lake shore road, or from time to time therefor as the road was encroached upon, and the applicants being legally in possession of the lands constituting the original road allowance, such lands could not be taken away from them, for the purpose of opening up the road, without their being awarded compensation, as provided for in sec. 641 of the Municipal Act, 3 Edw. VII. ch. 19 (O.); and the by-law for the opening up of the road was therefore quashed.

THIS was an application by Marion Lister and Henry F. Konkle to quash by-law No. 222 of the township of Clinton, providing for the opening up of the original allowance for road between lots 15 and 16 in the said township.

The facts are stated in the judgment.

The motion was heard before LATCHFORD, J., sitting in the Weekly Court on November 25th, 1908.

W. E. Middleton, K.C., and E. F. Lazier, for the motion.

H. E. Rose, K.C., and A. C. Kingstone, for the township of Clinton.



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February 22. LATCHFORD, J.:—The applicants are the owners of parts of lots 15 and 16 in the broken front concession on Lake Ontario and lots 15 and 16 in the first concession of the township of Clinton. The township was surveyed in 1791. The road allowance sought to be opened is shewn on the plan of the survey, but no road is indicated as then existing along the lake shore. The east half of lot 16 in the first concession of Clinton and the broken front of said half-lot—in all about eighty acres—were granted in 1819 by one Staats Overholt to one Henry Konkle. The deed does not mention or reserve either the road along the lake or the road allowance across the land between the broken front and the first concession. A description by metes and bounds is expressed in the deed, and within such metes and bounds the road allowance now in question was included. From the original Henry Konkle the east half of lot 16 has come down to Mrs. Lister. The description in the conveyance to her on the 23rd April, 1888, follows that in the deed from Overholt to Konkle. Whether the applicant Henry F. Konkle derives title from the Konkle of 1809 or from another does not appear. He deposes that he was born in Clinton in 1844, and has resided in the township all his life. He and Mrs. Lister and their respective predecessors in title enclosed, occupied and used as part of their farms, for upwards of sixty years, the road allowance along the base line across lots 15 and 16.

Along the shore of Lake Ontario and running east and west across the lands of Konkle and Mrs. Lister, in the broken front concession, a road has long existed; just how long does not appear, but certainly prior to 1850. It lies approximately parallel to the road allowance opened by the by-law. Twice at least, and probably on three occasions, Konkle moved back his fence on the south side of this road to permit the road to be deflected where portions of the road that had been washed away by the waters of the lake. He states that on each occasion he moved his fence at the request of the road master for the township of Clinton. Mrs. Lister's husband deposes that the fences on her property have been moved back at least four times in twenty years, each time a distance of not less than sixteen feet. The road on each occasion was deflected. Neither Mrs. Lister nor Konkle received any compensation for the lands they gave for

the purposes of the road. Statute labour and the moneys of the township of Clinton were for many years applied in maintaining and improving the road and at least one bridge upon it near Konkle's lands. It was, in fact and law, a common and public highway.

Owing to the erosive action of the lake, the road in 1904 and subsequent years became out of repair and unfit for travel. Lister urged the council to put it in proper condition, but, owing to the expense entailed, the council declined to take any action, and determined to open up the original road allowance—twenty-five or thirty chains to the south.

Notice of the intention of the council was given to Mrs. Lister and Konkle. One of the notices is as follows:—

“Township of Clinton, July 25th, 1908.

“Mrs. Claudius Lister,

“Madam,—

“I hereby notify you that a by-law will be introduced and passed to open road across lots 15 and 16, known as the base line, in the township of Clinton, on Monday, August 3rd, 1908, at town hall, Beamsville.

“Yours truly,

“(Signed) G. W. TINLIN,

“Tp. Clerk.”

Sections 642 and 643 of the Consol. Municipal Act, 1903, 3 Edw. VII. ch. 19, (O)., are as follows:—

642. “In case a person is in possession of any part of a government allowance for road, laid out immediately adjoining his lot and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or is in possession of any government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall, as against any private person, be deemed legally possessed thereof until a by-law for opening such allowance for road has been passed by the council having jurisdiction over the same.”

643. “No such by-law shall be passed until notice in writing has been given to the person in possession, at least eight days before the meeting of the council, that an application will be made for opening such allowance.”

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A road allowance is shewn on the plan of 1791 along the base line mentioned in the by-law. The applicants were in possession of these parts of the allowance adjoining their respective lots in the broken front concession. They had such parts enclosed by a lawful fence, and the road allowance so possessed and enclosed had not hitherto been opened to public use by reason of the lake shore road being used in lieu thereof. Mrs. Lister and Konkle were legally in possession of the portions of the base line road allowance which they occupied, and the by-law opening up the road allowance could not be passed by the township until the notice required by sec. 643 had been given.

The notice given was, I think, sufficient. It was served on the 20th July, and gives all the information the statute requires. The rule laid down in *Ostrom v. Township of Sidney* (1888), 15 A.R. 372, at p. 374, is not, I think, applicable.

In *Birdsall v. Township of Asphodel* (1880), 45 U.C.R. 149, the notice did not state the day on which the council was to consider the by-law, and it was there held that knowledge *aliunde* was not a sufficient answer to the application to quash the by-law. But in the present case the day is stated. The notice is headed "Township of Clinton," and is signed by Mr. Tinlin as township clerk, and the matter is to be considered at the town or township hall. It is manifestly the township council that would act in the premises. Unless the applicants were misled by the omission to mention the hour of meeting as well as the day, they cannot, in my opinion, complain. But they attended the meeting of the township council on the day named, or were there represented by counsel, and were heard before the by-law was passed. The notice was, in my opinion, a sufficient compliance with the statute.

The first recital in the by-law as to the existence of an original road allowance along the base line is undoubtedly true.

The second recital is as follows:—

"And whereas, in addition thereto, there existed from time immemorial, but not in lieu thereof, another road following the course of the shore of Lake Ontario."

The applicants say this statement of fact is unfounded so far as it states, or appears to intend to state, that the lake shore had not existed in lieu of the original road allowance. If the

lake shore road was, in fact, in lieu of the original road allowance, the by-law is defective.

Section 641 of the Municipal Act provides, among other matters, that "in case, in lieu of an original allowance for road, a new or travelled public road has been laid out and opened, for which no compensation has been paid to the owner of the lands so appropriated, such owner, if his lands adjoin the . . . original allowance, shall be entitled thereto in lieu of the road so laid out."

It is not open to question that the new road is to be opened in lieu of the old road. The by-law itself recites that, "by reason of the encroachment of the waters of Lake Ontario, a portion of the said highway along the lake shore has been washed away, and there is no means of access or any travelled road sufficient for the purpose of a public highway in the immediate vicinity of lots 15 and 16 in the broken front and first concession of said township." It does not necessarily follow because the original road allowance which the by-law purports to open is to take the place of the lake shore road, that the lake shore road was "in lieu of the original road allowance." But, when the circumstances of the case are considered, that conclusion is unavoidable. The lake shore road runs in the same direction as the road allowance and in the same vicinity. When in repair "it serves the purpose and accommodates the traffic of the public that the original road allowance was intended to do:" *Cameron v. Wait* (1878), 3 A.R. 175. See judgment of Cameron, C.J., at p. 232.

Neither Mrs. Lister nor Konkle nor any of their predecessors in title received any compensation for the lake shore road where it crossed their farms or where it was moved prior to 1904, as often as it was washed away. Their lands adjoin and, in fact, encompass on two sides the original road allowance. They are entitled to the parts of the road allowance across their farms, and, although they have not received conveyances from the township, the township could not, in my opinion, pass a by-law to open up the road allowance without providing for compensation to those so entitled. It has not provided for such compensation.

On this ground the by-law should be quashed. Order may issue accordingly with costs.

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[RIDDELL, J.]

## SEXTON V. GRAND TRUNK R.W. CO.

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Feb. 18.

*Railways—Cattle at Large—Competent Person—Boy of Ten—Judgment—  
R.S.C. 1906, ch. 37, sec. 294.*

Section 294 of the Railway Act, R.S.C. 1906, ch. 37, enacts that "no horses . . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway.

"(3) If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured."

The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants' line of railway. A train of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a "competent person" within the meaning of the above section:—  
*Held*, that the plaintiff was entitled to judgment.

THIS was an action tried before RIDDELL, J., and a jury at Toronto, on February 8th, 1909, for damages under the circumstances mentioned in the judgment, in which the facts are stated and the statutes and cases cited are referred to.

*J. M. Godfrey*, for the plaintiff.

*W. E. Foster*, for the defendants.

February 18. RIDDELL, J.:—This is a case tried before me, with a jury, at the Toronto assizes. The facts are very simple.

The plaintiff, who is a farmer residing in the township of Scarborough, on July 25th last, about the time that the morning train going east was expected, sent his son, a lad of some ten years of age, to take 14 cows along a public highway, across the line of railway, to a field south of the track. The train came along and killed four of the cows, the train travelling at the usual speed and at the usual time.

Four questions were submitted to the jury, which questions I here set out, with the answers:—

(1) Were the cows killed through the negligence of anyone?

A. Yes.

(2) If so, what was the negligence? Answer fully. A. In not blowing whistle and ringing the bell at the proper time. We also believe the engineer could have stopped his train in time to have avoided the accident.

(3) Damages, if any. A. Two hundred dollars.

(4) Was the lad a "competent person?" A. Yes.

A motion for nonsuit had been made at the close of the plaintiff's case and reserved. This motion was again made at the close of the whole case and again reserved. I now proceed to dispose of the case.

There was evidence upon which the jury might find that the accident was caused by the neglect of the defendants' servants to give the statutory signals, but none to justify the second alleged act of negligence—there was no evidence upon which the jury could find that the engineer could have stopped the train after seeing the cows. This is immaterial, however, as there is quite sufficient in the first finding of negligence to support a verdict for the plaintiff, if he is otherwise entitled to such verdict. Under the practice, I have nothing to do with the weight of evidence.

The damages are such as are justified by the evidence at least under my charge, permitting, as I did, the jury to give such damages as they thought fair for loss of profits which would take place before the plaintiff could replace his cows—the cows that were killed were milch cows, the milk from which the plaintiff was selling.

The whole question I have now to determine is whether I should have granted a nonsuit, and whether, notwithstanding the finding of the jury in answer to the last question, the defendants are not entitled to a nonsuit, or, more correctly speaking, to a verdict.

The argument for the defendants is based upon R.S.C. 1906, ch. 37, sec. 294 and sec. 294 (3): "No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway. . . .

(3) If the horses, sheep, swine or other cattle of any person which are at large contrary to the provisions of this section are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being killed or injured."

The express words of the statute, as well as the history of

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the legislation and decisions, make it abundantly clear that the bare fact of the cattle being at large without being in charge of some competent person as required by the statute would deprive the owner of all right to recover, even though the accident was caused by the negligence of the railway; the legislation was introduced for the safety of the public and not simply for the advantage of the railway company.

It is argued that the decisions are such that I must hold as a matter of law that the lad here was not a "competent" person within the Act; and Mr. Foster, in the very careful and comprehensive argument put in, cites a number of authorities which he contends put this beyond dispute. I am not able to agree with this contention.

The first of the statutes was that of 1857, 20 Vict. ch. 12, sec. 16: "No horses, sheep or swine or other cattle shall be permitted to be at large upon any highway within a half-mile of the intersection of any highway with any railway on grade unless the same respectively shall be in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection with any railway . . . and no person, any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any cause of action against any railway company in respect of the same being so killed."

Under this statute was decided *Simpson v. Great Western R.W. Co.* (1858), 17 U.C.R. 57. There a horse had escaped to the road, and, through defects in the cattle guards, had got upon the line of railway and had been killed when not at the point of intersection. It was held that it was the duty of the owner to prevent a horse from getting so at large, and his position was not improved by the fact that the horse had escaped and was at large without the knowledge or permission of his owner. The previous case of *Ferris v. Grand Trunk R.W. Co.* (1857), 16 U.C.R. 474, is not in point.

In *Thompson v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 92, the plaintiff's boy, a lad of 14, was driving four of the plaintiff's horses along the highway, about dusk, intending to put them in a field, the gate of which opened into the road about 60 yards from the crossing. While he was opening the gate, the horses, being loose, passed on to the track, and three

of them were killed by a train which was passing at its usual time. The Court held that there could be no recovery.

The horses were not haltered, but were driven loosely, and the Court held that "he had none of them in charge, any more than that he intentionally drove them out upon the road, meaning that they should stop at the gate, but taking no means to insure their doing so. All that can be said is that he knew where they were and might have seen, if there had been light enough; but that, as the event proved, afforded no security against their straying upon the railway track." It will be seen that the Court held the very fact that the boy did not keep the horses off the track, though he tried to do so, proved that the statute had not been complied with. This case is no authority for the proposition that a boy of fourteen or of ten years of age is not quite competent to take charge of cows. The second of the grounds upon which the judgment is put, namely, that the plaintiff was guilty of contributory negligence in sending his horses in charge of a boy, without bridle or means of control, after dark, has likewise no application to the present case. It is usual to have horses haltered, but not cows.

In the same volume is found the case of *Cooley v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 96. There the plaintiff sent three of his horses to a watering place upon the highway, with his servant, who merely drove the horses before him, not having any further means of control—bridle, halter or otherwise. They passed the watering place and got on to the railway over the cattle guard, which was filled with snow, and were killed. The Court held that "the plaintiff's horse was unlawfully upon the highway, having, by the negligence of its owner, been allowed to escape into the highway within half a mile of a railway crossing, from whence it got upon the railway at the point of intersection." In this case, also, the facts shewed that the horses were not under control.

Then came the consolidation in 1859, the C.S.C., ch. 66, secs. 147 and 149 of which contained the provisions which I have set out, almost *totidem verbis*. This being in force, came on for decision the case of *M'Gee v. Great Western R.W. Co.* (1864), 23 U.C.R. 293. This was a decision on a demurrer, and is not helpful on the matter now under discussion.

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The next case to be mentioned is *Markham v. Great Western R.W. Co.* (1866), 25 U.C.R. 572. There the plaintiff's son, as it was getting dark, was taking three horses along a highway which crossed the line of rail, riding one, leading another and driving the third. This third horse, being some 60 to 100 feet in front, attempted to cross the track as a train approached, and was killed. It was held that this horse was not in charge of any one within the meaning of the statute, and that the plaintiff, consequently, could not recover. The Chief Justice (Draper) says, speaking of the previous decisions: "The result of these decisions I take to be that horses which are driven near or across the railway loose, without halter, bridle or other similar fastening, and therefore under no actual present check or holdfast, and are not so close to their driver as to be under his immediate manual control and restraint, are not 'in charge' within the spirit and meaning of sec. 147 of the Railway Act." I do not find that the cases go quite the length stated by the learned Chief Justice; but, in any event, he is speaking of horses, and not of cows. Hagarty, J., says (p. 574): "We are unable to see how the horse, driven from 60 to 100 feet in front of the others, which, doubtless, were duly 'in charge,' can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. Common sense would suggest that in the dusk of the evening a train, rushing rapidly past the point that the witness was approaching, would startle the horse so driven, and render him quite unmanageable." That very able Judge, however, goes on to say: "If animals usually driven—viz., oxen, pigs or sheep—have to approach or cross a railway, we should naturally consider them as 'in charge' when the person or persons driving them could readily head them off or turn them, if necessary, from the track."

The new Act of 1888, 51 Vict. ch. 29, sec. 271 (D.), contains, in sub-secs. (1) and (3), the same provisions. Under that statute *Thompson v. Grand Trunk R.W. Co.* (1895), 22 A.R. 453, was decided. The case of *Duncan v. Canadian Pacific R.W. Co.* (1891), 21 O.R. 355, does not seem to be in point. The *Thompson* case is much relied upon by the defendants here. Mr. Justice Osler, in giving the judgment of the

Court, sitting in appeal in a county court case, says: "I cannot see that, under the circumstances, the fact that the animals were cows and not horses, as in the above case, makes any difference." But my learned brother is not saying that there is no difference in cows and horses in respect of the proper manner of handling and managing them. He goes on to say: "The point is, that they were left unattended."

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In that case the plaintiff's boy was ordered to drive seven cows and a heifer from one part of the plaintiff's farm across the highway to another part thereof, through two gates, nearly opposite to one another, one on each side of the road. The railway crossed the highway on a level about 300 yards south of the gates. Both gates having been first opened, the cattle were driven on the road. The heifer, separating from the cows, ran along on the road north; the boy left the cows, and ran after the heifer, and overtook and turned it and drove it back after it had run about 100 yards. In the meantime the other cattle had started down the road toward the railway, and got within about 100 yards of it by the time the boy had turned the heifer. The heifer continued to follow on past the gate after the cows, and started them all on a run towards the railway. They reached the track, and remained standing on it before the boy could get near enough to drive them across it; the train ran into them, killing two. Mr. Justice Osler, giving the judgment of the Court, says (p. 460): "The boy left some of the cattle standing on the road while he went to recover the one which had run off in a direction where no danger was to be anticipated. How can he be said to have been in charge of the others, within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection. As was said in the *Thompson* case, the boy foolishly took it for granted that they would stand still on the road, but they went on, as they were very likely to do, toward the crossing." And it was under these circumstances that the words referred to above were made use of by the learned Judge. After using the words already mentioned, the learned Judge goes on to say: "The servant's plain duty was to have driven those which had not escaped up the road

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into the field, before going after the heifer. The others were at large on the highway. His attention was withdrawn from them, and while he was absent and thus unable to control their movements, they cannot, in my opinion, be said to have been in charge of anyone within the meaning and for the purpose of the Act." It will be seen that the facts of that case led the Court to hold that the cows were not "in charge."

The Railway Act of 1903 made a slight change—3 Edw. VII. ch. 58, sec. 237 (D.)—and this is brought forward in the revision in the form set out in the early part of this judgment.

I find nothing to shew that it must be held as a matter of law that these cattle were not in charge of a competent person. The boy swore that had the whistle blown or the bell rung, he could and would have got the cattle over the track in time; the jury saw fit to believe him, and, while I might not have found in the same way had I been trying the case, I cannot say that his story was incredible. The cows were being driven in the manner in which cows are usually driven in this country; and the same precautions which should be taken in the case of horses would be ludicrous in the case of cows. Our farmers do not put halters or bridles on cows; and I can find no authority which compels me to say that they should. I should require express authority.

The statement of Hagarty, J., in the *Markham* case, I think, appeals to common sense, viz.: "If animals usually driven—viz., oxen . . . have to approach or cross a railway, we should naturally consider them as in charge when the person or persons driving them could readily head them off or turn them, if necessary, from the track." There is nothing to shew that the ten-year-old boy could not have done this—the jury have seen fit to believe his own account of his capacity; and I have no right to interfere with their finding.

I think the plaintiff must have judgment for \$200 and costs on the proper scale.

I have not thought it necessary to refer to the other legislation in the matter, as no advantage seems to be derivable from a consideration of these statutes. I have, however, read all the Acts *in pari materiâ*.

## [IN THE COURT OF APPEAL]

MORIN v. THE OTTAWA ELECTRIC R.W. Co.

C. A.

1909

Apr. 5.

*Damages—Negligence—Injury—Impairment of Prospects of Marriage—Remoteness—Excessive Damages.*

In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.

In such a case of accident to a young woman of about 21 years of age, living with her father, but earning \$6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—

*Held*, that a verdict of \$5,500 damages was not so excessive as to necessitate a new trial.

THIS was an appeal by the defendants from the judgment of Meredith, C.J.C.P., at the trial of this action before him and a jury, at Ottawa, on October 6th, 1908, which trial resulted in a verdict in favour of the plaintiff Lena Morin for \$5,500 and of the plaintiff Oliver Morin, her father, for \$233.

The action was brought by the plaintiffs for damages in respect to an accident caused, as alleged by them, by the negligence of the defendants, resulting in a collision between a car of the defendants, in which the plaintiff Lena Morin was a passenger, and another car of the defendants.

The appeal was on the ground that the amount of damages awarded to the plaintiff Lena Morin was excessive and unreasonable, and on the ground that the learned trial Judge misdirected the jury in charging them that they might take into consideration, in assessing the damages, the fact that the prospects of matrimony of the said Lena Morin were affected by reason of her injuries.

The appeal was argued on February 4th, 1909, before Moss, C.J.O., and OSLER, GARROW and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., for the appellants, contended that the damages were excessive, and that especially the prospects of marriage should not have been considered, and referred to *Smith v. Pittsburg R.W. Co.* (1898), 90 Fed. 783; *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250; *Cray v. Wabash and Grand Trunk R.W. Co's.* (1908), 13 O.W.R. 141.



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*A. E. Fripp*, K.C., for the respondents, contended that there was nothing to warrant the Court in concluding that the jury had gone astray in their verdict.

April 5. Moss, C.J.O.:—At the trial the defendants abandoned their defences to the plaintiffs' allegations of negligence, and the sole question submitted to the jury was as to the damages proper to be awarded to the plaintiffs respectively.

The plaintiff Oliver Morin was allowed \$233, and this is not objected to. The plaintiff Lena Morin, who was injured by reason of the negligent conduct of those in charge of one of the defendants' cars, in which she was riding, was allowed \$5,500.

The defendants complain of the amount as excessive, and ask for a new trial on that account. They also complain of misdirection, but, on the argument of the appeal, this ground did not appear to be urged with much confidence.

The objection is that the learned trial Judge, when specifying the heads of damage which the jury might consider and take into account in estimating the compensation which the plaintiff Lena Morin might receive, included amongst them the effect, if any, on her prospects of matrimony of the injuries which she had received. The learned Judge did not press the point very strongly. What he said was: "I suppose all women have a hope of marriage: how far will it interfere with her prospects of being settled in life and how far can you fairly measure that in money?" And he added, dealing apparently not only with this, but with all the other heads he had been previously alluding to: "It is a very difficult thing for anyone to estimate, and all you can do is to bring your sound judgment fairly to the consideration of these matters."

At the time of the accident the plaintiff Lena Morin was between 20 and 21 years of age, living with her father, but earning her own livelihood, working as a stenographer at a salary of \$6 per week. She had been engaged in this occupation for over three years. From her injuries resulted the amputation of her left leg at the knee, the loss of control of, or a form of paresis in a hand and arm—from which according to the medical testimony there may never be an entirely satisfactory recovery—and a very serious shock to her nervous system.

Manifestly, the burden of these tends to affect more or less permanently the health and constitutional powers of the individual, and the jury had an opportunity of observing the plaintiff while she was giving her testimony, and of forming some judgment as to her physical condition. From what they saw and heard, they could draw their own conclusions as to whether the results of her injuries were or were not likely to impair her prospects of a suitable marriage and settlement in life, with the accompanying freedom from self-dependence.

A jury may properly take into consideration any damages that are the natural and necessary result of the act complained of, and it would not be improper to draw the attention of the jury in this case to what was, in all probability, in the minds of all, the possibly injurious effect of the accident upon her prospects of entering into the marital relation.

There does not appear to be any case or opinion unfavourable to this view in our own or the English courts, while, on the other hand, the views of courts in the United States, so far as expressed, are favourable. There is nothing in what the learned trial Judge said that would be likely to unfairly influence the jury in considering the question of damages, and a new trial ought not to be granted on the ground of misdirection.

As to the damages being excessive, it must be confessed that they seem liberal. But they are the jury's estimate, and it is to be borne in mind that the plaintiff has not only been greatly crippled in the use of her major limbs, but she was subjected to the pain and suffering incident to these and the other injuries she sustained, and has been permanently it may be—though the medical witness hopes not—incapacitated from pursuing her occupation and means of livelihood.

The learned trial Judge fully laid before the jury all the elements of damage which they should consider and take into account. He cautioned them against giving to the plaintiff such a sum as would really amount to a punitive award rather than a fair compensation, and warned them of the impropriety of giving an amount that would secure her an annuity equal to or nearly approaching what she could have earned "if she had not been injured, and finally told them that they were not to give her anything on account of sympathy, "and do not especially give her

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anything because you think this railway company ought not to have allowed the accident to happen, and because you want to punish them and teach them to be more careful in the future, because that is not your function."

In this, as in every other branch of the charge, the learned trial Judge directed the jury fairly and reasonably, and with a due regard to the defendants' rights, and there is no reason to suppose that the jury misunderstood him in any respect. There is nothing in the circumstances to fairly give rise to the inference that the jury have taken into account matters which they should not have considered, and their award should not be interfered with.

The appeal should be dismissed.

OSLER, J.A.:—This is an appeal by the defendants from the judgment at the trial in favour of the plaintiff Lena Morin upon a verdict for \$5,500, which is complained of as being unreasonable and excessive. Incidentally and as probably having led the jury to give larger damages than they might otherwise have given, the charge of the learned trial Judge is in one particular objected to.

Apart from this objection, which I will presently mention, the charge was not complained of, nor do I see that it was open to objection or that it can be said that it was likely to mislead the jury or to induce them to deal with the damages otherwise than they were at liberty, upon the evidence, to deal with them in a case of this kind.

The plaintiff is a young woman of 20 or 21 years of age, and she sustained, in a collision on the defendants' railway, injuries of a very grievous and painful character, in the loss of a leg, severe and possibly prolonged impairment of the use of her working hand, injury to her back, bruises on the face and shock of her whole system. The learned Judge, after referring to some of the usual elements of damage, added: "Then she is a woman; how is it going to interfere with her prospects of matrimony? I suppose all women have a hope of being settled in life, and how far can you fairly estimate that in money? It is a very difficult thing for anyone to estimate, and all you can do is to bring your sound judgment to the consideration of these matters." It was objected that the jury should not have been told "that they might consider the element of matrimony."

As to the objection to the charge, I deal with this, just as it was presented, only as a question of law—namely, whether impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, is too remote to form one of the elements of damage. No case was cited to us from the English courts or our own, on the subject, nor have I succeeded in finding one there on the exact point. I think it would strike most people that the natural and probable consequences of such injuries would be to lessen a girl's chances of matrimony, and in *The Oriflamme* (1875), 3 Sawyer 397, Judge Deady makes an apt observation on the subject, at p. 404: "In this country at least it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance—comeliness—is a consideration of comparative importance in the case of every daughter of Eve."

In *Berry v. Da Costa* (1866), L.R. 1 C.P. 331, an action for breach of promise of marriage, where the plaintiff, while engaged, had been seduced by the defendant, a direction to the effect that the plaintiff was entitled to be compensated not only for the loss she had sustained in not becoming the wife of the defendant, but also for the aggravation of that loss by reason of the prospects of marrying another being materially lessened, was upheld by a strong Court. In *Smith v. The Pittsburg R.W. Co.*, 90 Fed. Rep. 783, it was said by the Court that "an injury to the person of a woman affecting her prospects of marriage should be as actionable as one to her character."

That was an action similar to the one before us, and loss of the prospects of matrimony was treated as one of the natural consequences of the injury the plaintiff had suffered. The case is referred to in several of the American text-books on the subject, but it is sufficient to cite *Watson on Damages for Personal Injuries* (1901), sec. 469; *Sutherland on Damages*, 3rd ed. (1903), vol. 1, sec. 93. The present case is not complicated by any questions of pleading or evidence, as in *Hunter v. Stewart* (1859), 47 Maine 419, and the objection to the charge, as taken, in my opinion, fails.

As to the amount of the verdict, it is, no doubt, very large

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—larger than I would have been disposed to give had I been trying the case—but, taking everything into consideration, I am quite unable to say that it indicates any gross error, misconception or improper motives on the part of the jury. I am therefore of opinion that we should not interfere. The appeal should be dismissed with costs.

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GARROW, J.A., and MACLAREN, J.A., concurred.

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[IN THE COURT OF APPEAL.]

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THE CITY OF TORONTO v. WARD.

*Landlord and Tenant—Possession taken in Expectation of Lease—Encroachment on Adjacent Land of Lessor by Tenant—Covenant for Renewal—Use and Occupation—Action for.*

1909

Jan. 19.

The defendant, in 1882, went into possession of certain lands situate on Toronto Island, under the expectation of obtaining a lease thereof for twenty-one years, which was shortly afterwards granted to him by the plaintiffs, owners of the freehold, the lease containing a covenant for renewal. The lands leased were three lots, described in the lease by their numbers on a plan. The defendant, in the belief that a piece of land, not so included, formed part of the lands leased, took possession of it with the lands actually leased, and occupied the whole. In 1891 the defendant allowed a person to occupy the encroached upon land as tenant, the latter paying defendant a yearly rental, it being stated by the defendant in a receipt therefor that such land formed part of his leasehold lands. Defendant's tenant continued to pay the yearly rent until 1905, when the plaintiffs, in making a survey of the lands, discovered the mistake made by the defendant, and notified the tenant not to make any further payments. In an action for use and occupation of the part encroached upon:—

*Held*, that the defendant could not claim to have acquired a title by possession, under the Statute of Limitations, of the land so encroached upon, for his possession was in his character of lessee, and would therefore be deemed to be that of his landlords, the claim made by plaintiffs for the use and occupation not constituting a repudiation thereof; nor could he claim to have the encroached upon lands included in the new lease to be given him under the covenant for renewal, for under that covenant he would only be entitled to a lease of the lands actually comprised in the old lease.

*Held*, also, that the city were not entitled to claim for the use and occupation of such encroached upon land prior to the termination of the lease to defendant, but were entitled thereafter to be paid therefor.

THIS was an appeal from the judgment of the Divisional Court, affirming the judgment of Britton, J., at the trial which took place at Toronto, on February 20th, 1908.

*James Fullerton*, K.C., for the plaintiffs.

*Walter Cassels, K.C., and W. H. Lockhart Gordon, for the defendant.*

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At the conclusion of the evidence the learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

March 19, 1908. BRITTON, J.:—The action was commenced on the 12th May, 1906.

The defendant is an Island constable, appointed by the city of Toronto, and resides upon property on the Island leased to him by the city. The lease is dated June 13th, 1882, and is for the term of 21 years from the first day of April, 1882.

The leased property is described as lots 41, 42 and 43 on the registered plan No. 365 of the eastern portion of the Island, west of the Gap.

This lease is renewable unless the city will pay for improvements, and the defendant has given notice that he requires a renewal of said term.

The defendant was appointed Island constable about 29 years ago, and at first went to live on the centre part of the Island. In 1882 he took possession of land, applied for and obtained a lease as above mentioned. This lease, the defendant supposed, covered the land now known as lot 44. Since getting his lease the defendant has erected a dwelling house, hotel and cottage upon the leased property. In 1891 Thos. Flynn of Toronto desired to move a house from the city to the Island, and he applied to the defendant for land on which to place this house. The defendant gave Flynn permission to place this house where it now stands, and it is in fact upon lot 44. The defendant supposed and so did Flynn when the house was moved to the Island and put in place there, that it stood upon land covered by the defendant's lease.

On June 5th, 1891, Flynn paid to the defendant \$25 and obtained from the defendant a receipt in these words:—

“Received, Toronto, June 5th, 1891, from Thos. Flynn the sum of twenty-five dollars being one year's rent in advance to the 15th May, 1892, for site now occupied by his house on my leasehold property known as Ward's Island including space in front of said house 60 feet by 30 feet. This rent of \$25 to be paid by said Thomas

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Flynn to me annually in advance until expiration of my present lease of this portion of the Island; terms to include right of way to and from this lot."

(Sgd.) "William Ward."

Flynn has paid annually the same amount to the defendant, so the defendant has received for rent, down to and including 1905, the sum of \$375. The plaintiffs then notified Flynn, and since the notice he has not paid rent. The defendant received other sums from Flynn for caretaking. These may be looked upon as gratuities, probably not aggregating a large amount, and need not be considered.

On the 25th of July, 1905, the assessment commissioner wrote to the defendant asking for a return and payment to the city of the rent collected by the defendant.

On the 28th of July the defendant's solicitors replied that they were acting for defendant, were looking into the matter, and hoped to be able to write more fully in a few days.

On March 27th and April 3rd, 1906, the city solicitor wrote to the defendant asking for an account of rent, etc.

On April 12th, May 3rd and May 11th, the city solicitor wrote to the defendant's solicitors for a statement of rents collected, etc.

On May 14th the defendant's solicitors wrote as follows:—

"We have your letter of 11th regarding this matter. We think you are a little premature in threatening to issue a writ in this matter before giving us the information we have asked for as to your claim. As soon as we know what your claim is, and on what you base it, we will advise you whether Mr. Ward can recognize it."

To this last letter plaintiffs' solicitor replied on May 14th, as follows:—

"In reply to your letter of 14th inst., I know of no information asked for by you that has not been furnished and to which you sent no reply."

On the 15th of June plaintiffs' solicitor served formal notice on the defendant requiring him to remove all buildings, etc., from lots not included in the defendant's lease.

To this the defendant's solicitor wrote in reply, denying the plaintiffs' right to remove the buildings and threatening an action if any attempt was made to act in accordance with the notice.

The plaintiffs then proceed with the present action.

In their statement of claim the plaintiffs allege that, "the defendant without lawful authority, and by falsely and fraudulently representing to Thomas Flynn, the occupant, that the land so occupied by Flynn formed part of the lands described in the lease by the defendant, and that the defendant was entitled to collect rent therefor during each of the years from May 15th, 1891, to May 15th, 1906, did collect such rent, which rent the defendant refuses to pay to the plaintiffs."

In the amended statement of claim the plaintiffs allege that:—

"(1) The lands so occupied by the said Flynn, as tenant of the defendant, are part of lot 44 on said plan, and were and are the property of the plaintiffs and abutted the said lands demised by the plaintiffs to the defendant. The defendant entered into possession of the said part of lot 44 as part of the lands covered by his said lease, and subsequently and on or about the 5th day of June, 1891, leased the same to the said Flynn, who has occupied the same down to the present time by the permission of the plaintiffs, but has paid nothing therefor to the plaintiffs, and the defendant became and is liable to compensate the plaintiffs for use and occupation thereof to the amount which the said Flynn has paid to the defendant."

(a) "The lands so occupied by the said Flynn belonged to the plaintiffs and abutted on lands demised by the plaintiffs to the defendant. The said Flynn had no lease thereof from the plaintiffs and occupied the same without license, but, in the belief that the said lands were included in the lands demised by the plaintiffs to the defendant, and that the defendant had a right to collect the rental thereof, he, the said Flynn, paid the said sums to the defendant, and the said defendant thereupon became and is a trustee thereof to the use of the plaintiffs."

The plaintiffs claim payment of the \$375, and interest received by the defendant, and they claim for the use and occupation of this part of lot 44 under the circumstances set out.

The defence is a general denial of any liability; the acquisition by the defendant of a title by the Statute of Limitations; and that the defendant entered into possession of that part of lot 44 leased by him to Flynn on June 5th, 1891, believing that the same was part of the lands covered by his lease from the plaintiffs; and by virtue of such encroachment and possession now claims that if he had not obtained an absolute title by possession, the lands became and now

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continue to be part of his holding under such lease and subject only to the payment of the rent thereby reserved.

The allegations in the statement of claim, except those imputing to the defendant fraud, have been established.

The defendant entered into possession of lot 44 believing that it was part of the land described in, and covered by his lease.

The position most favourable to the defendant is that he has made an encroachment adjoining the land he rents; namely, upon lot 44; and the presumption is that this encroachment is for the benefit of his landlord and the Statute of Limitations would not commence to run in favour of the defendant until the termination of his term.

In the present case it is not left to be determined by presumption, as the defendant has expressly stated in writing that the land he assumed to let to Flynn was on his leasehold property, known as Ward's Island. The whole Island belonged to plaintiffs, and the defendant had no other leasehold property there than that described in his lease above mentioned.

"If a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined." *Ramsden v. Dyson* (1865), L.R. 1 H.L. 129.

This is a much stronger case, as it appears to me, than taking mere waste land, or adjoining land that belonged to another than the landlord.

This proposition is stated generally in *Whitmore v. Humphries* (1871), L.R. 7 C.P. 1: "When a tenant takes in and encloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the original demised premises, is not rebutted by the fact that the landlord expressly assented to the enclosure being made, and when such presumption exists the Statute of Limitations (3 & 4 Wm. IV. ch. 27, sec. 7) does not apply until the original tenancy has ended."

I find as a fact that this lot 44 was occupied by the defendant as a mere extension of the locus of his tenancy; that the defendant took possession of the land as tenant and not with the object or desire of benefiting himself only, so as to acquire the ownership of this

lot 44. See *Hastings v. Sadler* (1899), 79 L.T.N.S. 355, Lord Russell, C.J., at p. 356.

As the defendant has held this lot 44 so long, and the plaintiffs took no action before the termination of defendant's term, the defendant must be deemed to have held it during the term as part of his holding, but it is recoverable by the plaintiffs at the end of the term.

*Tabor v. Godfrey* (1895), 64 L.J.N.S. Q.B. 245, was an action for injunction and damages brought during the term.

Charles, J., at p. 247: "A tenant who enters under one title cannot turn round and say he entered under another. I remember a case of a lease under a tenant by the curtesy and the lessee saying that no such lease could be granted—and in vain. The principle is that a man who gets in by reason of being tenant must take land as under his original take. That is the reason why it is said that a tenant who has occupied an encroachment has occupied it for the benefit of his landlord. It is said that that principle cannot be applied during the currency of the tenancy, but I believe it has been so applied, and I think that it does apply to a tenant who so occupies during the currency of his tenancy. The principle is that he comes in and has it as part of his take, and although the lease excludes it, yet by the way in which the landlord has permitted him to occupy, the encroachment must be taken as included in the demise."

This is not an action of ejectment, but for use and occupation, or for recovery of money which defendant has received by way of rent, to which he should have no right, and to which he has no right after the expiration of his term, and to which the plaintiffs are entitled.

The so-called lease given by the defendant to Flynn on June 5th, 1891, purports to be from May 15th, 1891, at \$25 a year, payable annually in advance, until the expiration of the then existing lease to the defendant. The lease expired on April 1st, 1902. The defendant has been paid by Flynn to May 15th, 1906, and this action was commenced on May 12th, 1906; the defendant has therefore received four years' rent—\$100—since the expiration of his lease.

I see no reason why plaintiffs should not recover that in this action.

The term is ended; it does not matter, that there is the plaintiffs' covenant for renewal of the term in a certain event. As I have said,

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this is not an action for recovery of possession, and I deal with the right of plaintiffs to possession only as bearing upon the plaintiffs' right to recover for use and occupation or to recover in any form in this action any of the money received by defendant from Flynn.

The defendant as tenant is obliged to give up the property if plaintiffs insist upon it; or must give up such part of the property as may not be demised by a new lease, and this applies to encroachments as they are considered part of the holding.

The tenant must give up at the end of the term unless there be a new lease, whether he has covenanted to do so or not. See Foa's L. & T., 4th ed., 755.

If there is ever any reason for a lax method of dealing with a tenant, it is not in this case.

The defendant, for \$5 a year, held under his lease for 21 years, a very valuable property belonging to the plaintiffs. He is now entitled to a renewal of that lease for a further term of 21 years at such rental per foot per annum as the land is worth for rental purposes irrespective of any improvements made by the defendant, unless the plaintiffs shall pay such reasonable sum as the buildings and permanent improvements, made and erected by the defendant, are worth.

In addition to the property covered by the lease the defendant took possession of 44.

Since 1891 he has been in receipt of \$25 a year which he has kept for himself, and he has declined to pay it over to the plaintiffs. The option now rests with the plaintiffs whether they will grant a renewal or pay for the improvements. The defendant cannot compel specific performance to grant a renewal. See *Hutchinson v. Boulton* (1852), 3 Gr. 391.

Then the defendant denies the title of plaintiffs to this lot 44.

There should be nothing in plaintiffs' way of getting substantial justice by reason of the form of the action. Any amendments necessary to enable the plaintiffs to get what by law they are entitled to should be made. So careful have the Courts been to protect the rights of landlords and give redress against tenants denying the landlord's title, that in such cases, in an action for recovery of possession, neither notice to quit nor demand of possession has been deemed necessary. See *Doe d. Graham v. Edmonson* (1844),

1.U.C.R. 265; *Doe d. Burritt v. Dunham* (1847), 4 U.C.R. 99; *Cartwright v. McPherson* (1860), 20 U.C.R. 251.

There should be judgment for the plaintiffs for \$100, the amount of the rental from Flynn for use and occupation of lot 44 from the expiration of defendant's lease to the commencement of this action, and with a declaration that the defendant has not acquired any title by possession or otherwise to the said lot 44.

As the defendant has brought the title to the land in question he should pay the costs.

From this judgment the defendant appealed to the Divisional Court. On June 2nd, 1908, the appeal was heard before MULOCK, C.J. EX.D., ANGLIN and CLUTE, JJ.

*E. D. Armour*, K.C., and *W. H. Lockhart Gordon*, for the appellant.

*James Fullerton*, K.C., and *William Johnston*, for the respondents.

June 27. ANGLIN, J.:—The defendant appeals from the judgment of Britton, J., dated the 18th of March, 1908, whereby he was ordered to pay to the plaintiffs the sum of \$100 for use and occupation of part of lot 44 on Toronto Island from the time of the expiration of the defendant's lease of lots 41, 42 and 43, until the commencement of this action, and whereby it was also declared that the defendant had not acquired any title, by possession or otherwise, to any part of lot 44. The judgment further required the defendant to pay to the plaintiffs their costs of this action.

The plaintiffs were admittedly the owners of Island lots numbered 41, 42, 43 and 44, as shewn by registered plan No. 365, prior to the first of April, 1882. On the 13th of June, 1882, the defendant Ward obtained from the city a lease of lots 41, 42 and 43 for the term of 21 years, to run from the 1st of April, 1882. Before he actually received his lease the defendant had probably taken possession of some lands which formed a portion of lot 44. The learned trial Judge has found that the defendant entered into possession of the part of lot 44 rented by him to one Flynn "believing that the same was part of the lands covered by his lease from the plaintiffs." Though he may have actually taken possession of the land in question before his lease was executed and delivered, it is reasonably clear upon the evidence that such possession was taken by Ward in con-

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templation of his lease, and that in taking possession he believed that the land so taken was part of the premises of which he was about to become tenant under the plaintiffs. He continued to hold possession of this portion of lot 44 throughout the whole term of his lease under the same belief. It was not until the expiration of the term and when steps were being taken in connection with the renewal of the lease of lots 41, 42 and 43, including a survey, that the discovery was made that the defendant had in fact encroached upon lot 44. Since 1890 Flynn has occupied a house erected upon part of lot 44, and the defendant has received from him \$25 a year as rental for this property.

The plaintiffs have brought this action to recover from the defendant the sum of \$375 and interest thereon for the use and occupation of that part of lot 44 occupied by Flynn's house, this sum being the equivalent of the rental received by the defendant from Flynn from the 1st of May, 1891, to the 15th of May, 1906.

In answer to this claim the defendant sets up first, that he is now the owner of the land occupied by him or his tenant not covered by the actual description in his lease; and that he has had title thereto by virtue of the Statute of Limitations for many years past; and in the alternative, that, if he has not become the owner of this land, it is because the same has been held as part of the premises demised to him by the plaintiffs; that as part of such demised premises the plaintiffs are entitled to no rent in respect of it in addition to that reserved in the lease, which has been fully paid; and that the defendant is also entitled to have such land included, as part of the demised premises, in the renewal lease which the plaintiffs are about to give him.

It is well established by numerous authorities that in respect of unenclosed land of the landlord adjoining or adjacent to the demised premises upon which the tenant has encroached during the term of his lease, he does not, as against the landlord, acquire title by possession, unless the encroachment is made under circumstances shewing an intention on the part of the tenant to hold the land so encroached upon for his own benefit, and not as part of his holding under the landlord: *Kingsmill v. Millard* (1855), 11 Ex. 313; *Earl of Lisburne v. Davies* (1866), L.R. 1 C.P. 259; *Whitmore v. Humphries*, L.R. 7 C.P. 1; *Doe d. Dunraven v. Williams* (1836), 7 C. & P. 332. If there were no presumption in the landlord's favour then

the question would be purely one of fact, namely, whether the tenant occupied as a mere extension of the locus of his tenancy, or with the object and intent of benefiting himself so as to acquire title under the Statute of Limitations (*Hastings v. Sadler*, 79 L.T. N.S. 355), and in the present case the inference would be irresistible that he occupied as tenant and treated the disputed land as part of the demised premises, and that the landlord so permitted him to occupy it. But here the portion of lot 44 taken possession of was unenclosed and immediately adjacent to the demised premises; the defendant admits that he held possession of this land believing that it was covered by his lease; and there were no circumstances attending his occupation of it to indicate that he held it otherwise than as part of the demised premises. The well-established doctrine would therefore clearly apply but for two circumstances which are much relied upon by the learned counsel for the defendant as excluding its application.

In the first place he says that, possession of the land in dispute having been taken prior to the lease, there is no presumption that it was taken as part of the demised premises, and that the fact that he became tenant of adjacent land did not change the character of his possession of that not described in the lease and of which possession had been taken before the lease; and he cites *Dixon v. Baty* (1866), L.R., 1 Ex. 259, in support of this proposition. The facts of that case shew that the possession taken of the strip of land there in question was long prior to, entirely distinct from, and in no wise connected, either in anticipation or otherwise, with the lease of the adjoining close subsequently taken. In the present case the possession taken of the portion of lot 44 in question was taken in contemplation of the lease and with the idea and purpose of occupying the same as part of the premises to be leased. There never was any possession by the defendant of the piece of land in question otherwise than as tenant or prospective tenant of the plaintiffs. This circumstance entirely distinguishes the present case from *Dixon v. Baty*. In my opinion, there is nothing in the mere circumstance that the defendant, in anticipation and in contemplation of his lease from the plaintiffs, entered upon this adjoining piece of land, which he understood to be and treated as part of the demised premises, to give him possession of such a character that the Statute of Limitations would run in his favour.

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The other point raised by the learned counsel is that the attitude of the plaintiffs, in demanding compensation from the defendant for use and occupation of the piece of land in question, in addition to the rent reserved in his lease from them, is tantamount to a repudiation on their part of the defendant's claim that the land in question constituted part of the demised premises; and he maintains that where there has been such a repudiation the landlord is estopped from denying that the possession of the tenant enures for his own benefit under the Statute of Limitations, citing *Attorney-General v. Tomline* (1880), 15 Ch.D. 150, and *East Stonehouse Urban District Council v. Willoughby Brothers, Ltd.*, [1902] 2 K.B. 318.

In the former case it was held that subsequent grant of the original tenement to a new copyhold tenant, by a description which clearly did not include the encroachment, excluded the presumption that the latter had been made as an accretion to the original holding. This case is distinguishable in several respects from the present. The additional land was first occupied by the copyhold tenant by express license of the landlord; it was therefore held by the Court not to have been really an encroachment. There were several renewals of the copyhold tenure by a description excluding the additional land. The circumstances precluded any possibility of an assumption that the land in question was at any time regarded as part of the copyhold premises by either the landlord or the tenant. The Court held that the Crown, whose servants had occupied the strip of land there in question without license from 1811 to 1874, had a clear title to it by possession as against the landlord, but left open the question whether the doctrine, that encroachment by a tenant enures to the benefit of the landlord, is applicable to copyhold.

Thesiger, L.J., says, at p. 161: "Inasmuch as the principle that encroachments by tenants enuring (*sic*) for the benefit of their landlords is founded upon a presumption of fact, a landlord and tenant may so conduct themselves in the course of transactions, either by deed or otherwise, as to shew that the landlord treated the encroachment as not enuring to his benefit." And Cotton, L.J., says, at p. 160, that the rule "is liable to be rebutted, not only by the circumstances under which the encroachment or accretion was acquired, but by any dealings between the landlord and tenant in determining their rights." James, L.J., points out that not only

were there in that case grants by the landlord by descriptions, excluding the additional piece of land, but that the landlord accepted from the tenant surrenders of the copyhold premises without the additional piece of land. The copyholder and the landlord were clearly precluded thereafter from asserting that the encroachment had become part of the copyhold and was held with it. The theory that the piece of land was an accretion to the copyhold was therefore entirely excluded.

In the case in [1902] 2 K.B. 318, the encroaching tenant was held not to have acquired title to the encroachment. The circumstances of this case were such that it affords little assistance in dealing with that now under consideration.

I can well understand that if it is shewn that a tenant took possession after refusal of his landlord to permit him to do so, that fact should be deemed sufficient to rebut any presumption that the encroachment was for the benefit of the landlord: *Doe d. Baddeley v. Massey* (1851), 17 Q.B. 373; so if the tenant has conveyed away the encroachment with the knowledge of the landlord: *Kingsmill v. Millard*, 11 Ex. 313. But a mere demand by the landlord after the expiry of the term, though sought to be enforced by suit, that the tenant should pay compensation for the use and occupation of the land occupied by him and not covered by the description in his lease, does not, in my view, amount to a disclaimer by the landlord that the defendant's occupation had been that of his tenant. If it does, *a fortiori* the action of the landlord in *Tabor v. Godfrey*, 64 L.J.N.S.Q.B. 245, in suing for trespass and claiming an injunction should have been so regarded. Yet we find no suggestion that such was the effect of the landlord's proceedings in that case. On the contrary, the defendant succeeded on the ground that he held the strip of land there in question as a portion of the demised premises.

Here the learned trial Judge refused to allow the plaintiffs' claim for compensation for use and occupation during the term, limiting their recovery to the period since the expiration of the lease. The mere fact that the plaintiffs sought ineffectually to recover additional compensation for the use and occupation of the land in question is not, in my opinion, such a repudiation of the tenant having occupied this land as part of the demised premises as will estop the landlord from denying that the occupation enured to the tenant's benefit so as to give him title under the Statute of Limita-

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tions. Nor does the landlord's refusal to include the disputed strip in the renewal lease so operate. Neither fact is, in my view, sufficient to rebut the presumption to which the circumstances in this case certainly give rise, that the tenant took and held the land in question as part of the premises leased by him from the plaintiffs.

A demand for compensation for the use and occupation, during the term of the tenancy, of the land encroached upon, is not such an unequivocal repudiation of the position that the land was held under the landlord and as an accretion to the tenant's holding as should suffice to rebut the presumption of fact that it is part of the holding and belongs to the landlord.

The next question for consideration is whether under these circumstances the defendant is entitled to have the disputed land included in the premises to be covered by the renewal lease. Mr. Armour, in support of the contention that he is so entitled, cites *White v. Wakley* (1858), 26 Beav. 17. No other authority was cited, and after an exhaustive search I have been unable to find any case which throws light upon this question. In *White v. Wakley* the tenant, with the sanction of his landlord, built a house and farm buildings on the waste adjoining his farm and held them with the farm until the termination of his lease. Upon the expiry of the lease the landlord insisted that the tenant was obliged to put this house and buildings in repair under the covenant in the lease. The Court held that inasmuch as, in favour of the tenant, it would hold that the landlord could neither recover possession of this added land until the expiration of the term, nor demand any additional rent for it, so, in favour of the landlord, it should as a matter of equity hold that all the conditions, covenants, and agreements which apply to the property originally demised do in equity apply also to that which is added to and treated as part of it, and the tenant was held bound to repair accordingly.

Now, although the assent of the landlord is not material in considering the question of encroachment and the right of the landlord to delivery up of an accretion to the demised premises upon the expiry of the term (*Whitmore v. Humphries*, L.R. 7 C.P. 1), such assent may be most material when dealing with the equitable rights of the parties to the lease. But for the assent of the landlord in *White v. Wakley*, there can be no doubt that within a reasonable time after the tenant had encroached the landlord could have re-

covered possession of the land encroached upon. The encroachment must, in the absence of such assent, have existed for a length of time sufficient to raise the presumption that it was held as part of the demised premises with the concurrence of the landlord, before he could be prevented from asserting his right to have the tenant treated as a trespasser. But, where there is no express assent and, as a result of mistake, the tenant has occupied with the demised premises a portion of his landlord's unenclosed property, and the landlord has, upon discovery of the mistake at the expiry of the term, promptly repudiated any intention to continue to treat the encroachment as part of the leasehold premises, I am unable to perceive any equity which would entitle the tenant, in respect of the encroachment, to the benefit of a covenant for renewal contained in the lease. This covenant is expressly restricted by the terms of the lease to "the premises hereby granted," which do not include the accretion. As pointed out in *White v. Wakley*, "at law the estate of the testator (the tenant) would certainly not be liable; the land is not included in the covenant, and an action of covenant would produce nothing." In order to entitle the tenant to the benefit of the covenant in respect of land not included in it, he must establish some equity which would justify the Court in extending the operation of the covenant. Such an equity existed in *White v. Wakley* by reason of the express sanction given by the landlord to the tenant including the encroachment with the demised premises. It is put in this way: the Court "would have treated the permission of the landlord to build as equivalent to a permission, on his part, that the thing built should be treated as part of the original demise, and the Court, so treating it, would have treated the act of the tenant, by building on and holding the other property, as an engagement, on his part, that it should be treated as part of the land originally demised." It was this equitable obligation of the tenant, corresponding with and co-relative to the equitable obligation of the landlord, which the Court there enforced.

Here the rights of the parties are purely legal. There is nothing to give them an equitable character. It seems to me to be certainly no part of the legal rights of the defendant to have premises, not covered in terms by the covenant for renewal contained in his lease, held to be included in that covenant merely because he has occupied this additional land for a term of years without paying extra

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rent for it. It is unnecessary to add that this circumstance can give him no equitable right. I would therefore dismiss the appeal on this ground.

I do not wish to be understood as holding the view that if the circumstances of this case brought it within the principle of *White v. Wakley*, the equity of the tenant would extend to the covenant for renewal so as to entitle him to have the land encroached upon included in the renewal lease. That question I desire to leave open. It suffices for the disposition of the present case that no equitable right on the part of the tenant has been established, and that his legal rights do not entitle him to have the land encroached upon included in the renewal lease to be given pursuant to the landlord's covenant.

The claim which it was sought to put forward at bar, that the defendant, in the event of his failing to obtain a renewal should be allowed for permanent improvements made under mistake of title, is not involved in the present action and will be in no wise prejudiced by the present judgment.

The appeal will be dismissed with costs.

MULOCK, C.J. Ex.D.:—I concur.

CLUTE, J.:—I agree. The defendant pleads in paragraph 4, added by amendment, "That he encroached and entered into possession of that part of lot 44 leased by him to the said Flynn, on or about the 5th of June, 1891, believing that the same was part of the said lands covered by his lease from the plaintiffs."

This formal admission, found to be a fact by the learned trial Judge, and about which, from the evidence, there can be no doubt, concludes the defendant's claim of the right to set up title against the landlord, in my opinion.

"A tenant who enters under one title cannot turn around and say he entered under another:" *Tabor v. Godfrey*, 64 L.J.N.S.Q.B. 245.

It is not left here as a presumption that he entered under the lease; it is established as a fact, and that fact being established, he is estopped from denying his landlord's title. In many of the cases cited on the argument and referred to in the judgment of my brother Anglin, it was necessary to appeal to a presumption to establish the landlord's right. As was said by Lord Campbell, C.J., in

*Andrews v. Hailes* (1853), 2 E. & B. 349, at p. 353, "I think it must be considered that the encroachment in this case was held by the defendant as part of the demised premises; and, that being so, I think the defendant is not at liberty to deny that it was part of them. I proceed on what the civil law calls *exceptio personalis*, and the common law an estoppel, and say that the tenant cannot deny this. I do not adopt the doctrine that the tenant steals for his landlord. and that therefore the landlord at the end of the demise is entitled to claim the stolen property; but I think that, when the property is taken and used as part of the holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises." This case was referred to with approval in *Doe d. Croft v. Tidbury* (1854), 14 C.B. 304, 324.

The cases do not proceed upon the assumption that the enclosed land was, or was intended to be, included in the lease, but upon the ground that it was so held. That being established, either by presumption or by being proven as a fact, the tenant is estopped. As in this case there is no pretence that the holding was by the sanction of the plaintiffs, or that they had knowledge of such holding, there is no equity raised in favour of the defendant to have this lot included in a renewal of the lease. The case would be entirely different if he had entered with the sanction of the landlord, both supposing that the land was covered by the lease, and under such entry had made improvements, the landlord standing by and permitting the same. He entered and held the land for the term, believing that the same was part of the lands covered by his lease. This precludes him from saying that he held under some other title, but it does not, in my opinion, enable him to say that he is entitled to claim the covenant in the lease for renewal.

The appeal should be dismissed with costs.

From this judgment the defendant appealed to the Court of Appeal.

On November 2nd, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*E. D. Armour, K.C.*, and *W. H. Lockhart Gordon*, for the appellant. The appellant is entitled to the land, either by virtue of his having acquired a title by possession under the Statute of Limita-

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tions, or as part of the leasehold premises to be included in the new lease to be given him under the covenant for renewal. The possession of the land was taken by him before the lease with the respondents was entered into. There was no presumption, therefore, that such possession was taken as part of the demised premises. The relationship of landlord and tenant did not exist at that time. The authorities, therefore, holding that where a lessee encroaches upon, or takes possession of adjoining land, his possession enures to the benefit of his landlord, do not apply: *Hastings v. Sadler*, 79 L.T.N.S. 365; *Tabor v. Godfrey*, 64 L.J.N.S. Q.B. 245; *Dixon v. Baty*, L.R. 1 Ex. 259. The respondents have so treated the appellant's possession of the land as to preclude them from claiming that it formed part of the land leased. By claiming to recover from the lessee for use and occupation, they have repudiated its forming part of the land leased, and are therefore estopped from denying that the possession of the appellant was for his own benefit: *Attorney-General v. Tomline*, 15 Ch.D. 150. It is immaterial under what impression possession was taken by the appellant, so long as it was taken by him independently of the owner: *Duke of Leeds v. Earl of Amherst* (1846), 2 Ph. 117, 124. If, however, the land was occupied as part of the lands demised, it constituted part of the demised premises on the termination of the lease, and the appellants are entitled to have it included in the new lease to be given under the covenant for renewal: *White v. Wakley*, 26 Beav. 17; *Muller v. Trafford*, [1901] 1 Ch. 55, 61; *Moore v. Clinch* (1875), 1 Ch.D. 447, 452; *Furnival v. Crew* (1744), 3 Atk. 83; *Jack v. McIntyre*, 12 C. & F. 151.

*James Fullerton*, K.C., and *W. Johnston*, for the respondents. The appellant no doubt took possession of the land before he obtained his lease, but it was in view of the lease being granted, and in belief that it was part of the land to be comprised in the lease, that he did so, and it continued to be occupied by him in such belief during the whole of the term. The fact that it did not form part of the demised premises was only discovered after the lease had expired, on a survey being made to ascertain accurately the boundaries of the different lots. The appellant, therefore, cannot be held to have occupied the lands for his own benefit, but in the character of lessee, and, whatever was the effect of his

occupation it enured to the benefit of the respondents: *Whitmore v. Humphries*, L.R. 7 C.P. 1. In the case of *Attorney-General v. Tomline*, 15 Ch.D. 150, the lands were not encroached upon or occupied by the copyholder in his capacity of copyholder, but under the express license of the lord of the manor. The covenant to renew does not carry with it any right of renewal to lands not comprised in the original lease. It is entirely independent of the other covenants contained in the lease, and would be perfectly good if it were contained in a separate instrument. The appellant is, therefore, only entitled under such covenant to a new lease of the lands comprised in the old lease. The fact of the respondents having claimed for the use and occupation of the lands in question does not raise any presumption that they were held by the tenant apart from his character of tenant. He had occupied the lands and rented them at a profit, and the respondents were certainly entitled to any benefit derived from his leasehold. At all events they would be entitled to be paid for the use and occupation after the expiration of the term: *Foa L. & T.*, 3rd ed., pp. 686-7, where the cases are collected.

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January 19. OSLER, J.A.:—I am of opinion that the judgment of the Divisional Court should be affirmed. As regards the defence of the Statute of Limitations, although the defendant states that he took possession, or was in possession or partial possession, before the execution of his lease from the plaintiffs of what has since been discovered to be lot 44, which adjoined, but was not included in, the premises demised, it is plain, from his own evidence, that from that time forward he occupied and dealt with it under the belief that it was covered by the lease, and that he was not occupying it adversely to the plaintiffs.

The instrument evidencing his sub-lease of the lot in question or part of it to Flynn clearly shews this, as it describes the property so leased as "the site now occupied by his house on my leasehold property known as Ward's Island," and refers to the termination of Flynn's holding as "the expiration of my present lease of this portion of the Island."

There are here circumstances which, taken in connection with the further fact that when the defendant first entered upon the lot he was an official in the employment of the plaintiffs upon their

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Island property, strongly prove that his possession was not adverse to the owners, and that he acted as their tenant in respect of it, notwithstanding that such possession may have actually commenced before the execution of the lease. These circumstances as there pointed out, were wanting in *Dixon v. Baty*, L.R. 1 Ex. 259, and exclude the application of that case as an authority governing the present. The defendant is therefore not in a position to assert that, by such possession continued throughout the term of his lease, he has acquired title under the Statute of Limitations, and the case presented is, so to speak, the ordinary one of an encroachment by the tenant, without the landlord's assent, upon property of the latter, which was not part of the land demised, but which he nevertheless holds as belonging to the landlord, and possession of which he must deliver up at the expiration of the term or pay for its continued use and occupation: *Whitmore v. Humphries*, L.R. 7 C.P. 1; Woodfall on L. & T., 18th ed., p. 826; Redman & Lyons on L. & T., 5th ed., 239-240; Foa on L. & T., 4th ed., p. 679.

The defendant, however, contends that if he is regarded as having dealt with lot 44 under circumstances which repel any other presumption than that he was treating it as part of his holding, the plaintiffs cannot sue for use and occupation, because he is equitably entitled to have it included in the renewal lease of the premises which were actually demised. I fail to see how any equity of that kind arises. The defendant did not enter with the sanction of his landlords, who appear to have been ignorant until shortly before the expiration of the term that he was in possession of any property not covered by the lease. In consequence of this he has been fortunate enough to hold it rent free for many years, and even if the equity he sets up would, if proved, have been sufficient to establish the right he asserts, I think that his right of renewal is confined to what the covenant in the lease gives him. I do not think it necessary to go over the cases of *Hastings v. Sadler*, 79 L.T.N.S. 79; *Tabor v. Godfrey*, 64 L.J.N.S.Q.B. 245; *White v. Wakley*, 26 Beav. 17; *Attorney-General v. Tomline*, 15 Ch.D. 150, and other cases referred to and relied upon by the defendant in support of his several contentions. This has been done in the judgments in the Court below, where these cases have been very fully and clearly distinguished on their facts from the case at bar.

Agreeing with these judgments, I would dismiss the appeal.

MEREDITH, J.A.:—If the defendant had sought, in this action, to reform the lease by including lot 44 in the parcels, it may be that, upon the evidence which has been adduced in it, he might have succeeded; but it also may be that, if he had made such a claim, much further evidence would have been given, either displacing it altogether, or establishing it firmly. Therefore, to give effect to it now would be like a leap in the dark—quite unsafe and improper; though, indeed, the ultimate result would be the same, as far as the substantial rights of the parties in the annual value of lot 44 are concerned, as an affirmance of the views of the Divisional Court respecting such rights, for in fixing future rent the value of the whole property must be taken into account.

Dealing with the case as presented by the parties, the Divisional Court was, in my opinion, right.

It must be held, upon all the facts of the case, that lot 44 was always in the possession of the defendant, and those claiming under him, as part of the demised lands. It was expressly so dealt with by him; and, on the other hand, nothing has been done by the plaintiffs sufficient to preclude them from now maintaining that position. There is a great difference between seeking, after the expiration of the term, to enforce a claim for additional rent, for the use by the tenant of the additional land and a conveyance of such land to a third person, free from the lease, during its currency. Substantial success as to continued possession of lot 44 can go to the defendant only if in fact the renewal of the lease provided for is part of the original demise, and an extension merely of the term. But that is not so. Under the lease the term is ended, and the lessee is bound, under its provisions, to yield up peaceable possession. That which he is entitled to is a new term in accordance with the terms of the agreement; that is, a new term and a new lease of the parcels actually demised. If success went to the defendant as to future possession of this lot, it would be at the cost of its annual value, for that would be included in the future rent to be fixed, as the agreement for the new lease provides.

The appeal should, therefore, be dismissed.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred in the result.

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[IN CHAMBERS.]

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*Conviction—Justice of the Peace—Indictable Offence—Criminal Code, secs. 521, 583, 602, 778 (3)—Information, Immateriality of—Charge Formulated and Read Over to Accused—Trial and Conviction Thereunder.*

An information laid under sec. 521 of the Criminal Code charged that the accused, on, etc., did unlawfully and wilfully commit damage by breaking four insulators on telegraph poles, the property of the Canadian Pacific R.W. Co., contrary to the provisions of the said section, without stating, as required by the section, that the insulators formed part of and were used and employed in and about the electric telegraph line of the railway, or that the damage was done without legal excuse and without colour of right. The magistrate, however, did not try the accused on the information, but on his electing to be tried summarily, and on the magistrate deciding to try the case, he, as required by sec. 778 (3) in cases of indictable offences, formulated the charge in writing, containing all the requirements of sec. 521, which he read over to the accused, who pleaded guilty thereto, and on such charge, so formulated and pleaded to, the accused was tried and convicted:—

*Held*, that the charge being for an indictable offence, it was not essential that the whole subject matter, including matters requiring to be negatived, should be set out in the information, its object being merely to inform the magistrate of the nature of the charge, the accused not being tried and convicted thereon, but on the charge as formulated and read over to him.

*Held*, also, that it was immaterial that the warrant of commitment followed the information, for that the keeper of the prisoner or any Court before which the matter might come up on *habeas corpus* would be sufficiently informed of the nature of the offence; but if not, there being a valid and regular conviction, opportunity would be afforded of allowing a warrant in strict compliance with the conviction to be lodged with the keeper.

*Held*, also, that the punishment imposing nine months' imprisonment was not, under the circumstances, excessive.

THIS was a motion on behalf of the defendant for his discharge from custody upon the return to a writ of *habeas corpus*.

The motion was heard before ANGLIN, J., sitting in Chambers on October 6th, 1908. The facts are stated in the judgment.

*W. J. Tremear*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

October 9. ANGLIN, J.:—The defendant is confined in the Central Prison at Toronto under a warrant of commitment reciting that "he did, on the 14th day of August, 1908, at Plattsburg, on the Canadian Pacific Railway, district of Thunder Bay, unlawfully and wilfully damage, by breaking four insulators on telegraph poles, property of the Canadian Pacific Railway Company, contrary to sec. 521 of the Criminal Code."

The information upon which the conviction was had is in the same terms.

In the conviction itself the offence is stated in these words: "That he, the said William Gill, on the 14th day of August, 1908, at Plattsburg, on the Canadian Pacific Railway, in the district of Thunder Bay, did unlawfully and wilfully, and without legal justification or excuse, and without colour of right, commit damage by breaking four insulators on telegraph poles, the property of the Canadian Pacific Railway Company, the said insulators forming part of, and being used or employed in and about the electric telegraph line of the said Canadian Pacific Railway Company, contrary to the provisions of sec. 521 of the Criminal Code."

The record of the proceedings shews that the magistrate, as required by sec. 778 of the Criminal Code, reduced the charge against the accused to writing before requiring him to plead. The charge so reduced to writing is in the same terms as the conviction, and the record proceeds to state that the defendant elected to be tried summarily and pleaded guilty to such charge.

The grounds upon which the discharge of the accused is sought are: (1) that the information does not state that the damage was done "without legal justification or excuse and without colour of right," and (2) that the information does not sufficiently state an offence under sec. 521, but states at most an offence under sec. 539, for which the statute prescribes the punishment of a fine, and permits imprisonment only in default of payment of such fine.

Counsel for the defendant maintains that the omission from the information of an allegation that the damaged insulators formed part of, and were used or employed in and about the electric telegraph line of the Canadian Pacific Railway, is fatal to the conviction.

Counsel further contended—relying upon an affidavit of the accused—that his plea of guilty was to a charge under sec. 539, and that he did not intend to and did not in fact plead guilty to a charge under sec. 521, or to any charge which would subject him to the imprisonment imposed upon him. But the record shews that the magistrate, in compliance with the provisions of sec. 778 (3), formulated in writing the charge against the accused in the very terms of sec. 521, and that it was to the charge so formulated that the accused made the plea of guilty. It would be quite unsafe to accept the statement of the accused as against

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the formal record which has been produced. Upon this point, therefore, effect should not be given to Mr. Tremear's contention.

It is quite apparent that the information was not amended, and it may therefore be necessary to consider its sufficiency as the foundation for the conviction which has been made, in view of the two exceptions taken to it.

Section 540 of the Criminal Code declares that "nothing shall be an offence under any of the foregoing provisions of this part unless it is done without legal justification or excuse and without colour of right."

Mr. Tremear's contention is that this provision of the statute renders it necessary in every information for an offence against any of the provisions of the part of the Code, which includes sec. 521, to allege that the act complained of was done without legal justification or excuse and without colour of right.

I cannot agree in this view. I think sec. 521 makes a provision in the nature of a proviso or exception, and, being in a subsequent clause and not in the enacting part of the section creating the offence, such proviso or exception is a matter of defence or excuse which need not be noticed in the information or conviction: *Regina v. White* (1871), 21 C.P. 354. But, if the information should have contained these averments, the objection based upon their omission is, in my opinion, fully met by the considerations upon which I dispose of Mr. Tremear's other objection.

The omission from the information of an allegation that "the insulators formed part of and were used or employed in or about the electric telegraph line of the Canadian Pacific Railway Company," raises an important question. Had the information not contained the additional words, "contrary to the provisions of sec. 521 of the Criminal Code," there would certainly not have been enough in it to amount to a charge of an offence under sec. 521.

For the Crown it is contended that the presence of these concluding words makes the statement of the crime charged sufficient, notwithstanding the omission of the allegation that the insulators destroyed formed part of an electric telegraph line. Mr. Cartwright refers to sub-sec. 2 of sec. 583 of the Code, which provides that "a count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of such count the Court shall have regard to such reference," and to

clause 16 of sec. 2, which, as amended by 7 Edw. VII. ch. 8, sec. 2, provides that in the Code, unless the context otherwise requires, the words "indictment and count," respectively, include information and presentment as well as indictment." In a similar provision the word "information" has been held to mean an information laid before a magistrate as the foundation for a summary conviction: *Regina v. Cavanagh* (1877), 27 C.P. 537.

Mr. Cartwright's contention is that, having regard to the reference in the information to sec. 521, it is made reasonably clear that the charge laid was breaking insulators which "formed part of or were used or employed in or about an electric telegraph line;" otherwise the offence would not be contrary to the provisions of sec. 521. No doubt to a lawyer this inference would be reasonably plain. But, at all events under the summary conviction provisions of the Code, one of the principal purposes of the information is to give to the accused reasonably specific knowledge of the offence with which he is charged, and it has been long settled that the description of the charge in the information must include every ingredient required by the statute to constitute the offence: *Regina v. France* (1898), 1 Can. C.C. 321. The requirements for an indictment are the same: *Regina v. Cameron* (1898), 2 Can. C.C. 173. The accused is a layman quite often without professional advice. He is probably to be presumed to have knowledge that the offence created by sec. 521 is a punishable crime, but he should certainly not be presumed to know that the number of the section of the Code which creates and defines that offence is 521. To the accused the reference to sec. 521, unless he had means of information not ordinarily possessed by the layman, would not convey the knowledge that the charge against him included ingredients not set forth in the information. In summary conviction proceedings the Code requires that the magistrate shall state to the accused the substance of the information or complaint: sec. 721. It is to the information that the accused is asked to plead. Giving due effect, therefore, to the reference to sec. 521, as directed by sub-sec. 2 of sec. 583, the sufficiency of an information, in the terms of that now under consideration, to support a conviction under sec. 521 made under the summary conviction procedure of the Code, if that were possible, would be at least gravely doubtful. My present inclination would be against supporting such a conviction.

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But, when the offence is not punishable under the summary conviction sections, but is an indictable offence, the procedure is quite different. Here the main purpose of the information is not to give the accused knowledge of the charge laid against him and which he is called upon to meet; it is rather to inform the magistrate in the first instance upon what charge a warrant or summons is asked against the accused. The magistrate, unlike the accused, may be presumed to know the particular offence referred to when it is described as an offence contrary to the provision of the Code bearing a certain number. For his purpose, therefore, an information in the form of that now under consideration may be quite adequate and unobjectionable. The magistrate does not arraign the accused upon the information. He is expressly required, if he decides to proceed upon the election of the defendant to try him summarily for an indictable offence, to formulate the charge in writing, and to read it when so formulated to the accused, and it is to the charge so formulated and read that the accused must be asked to plead. The charge so formulated, with the plea thereto of the accused, becomes the record upon which the magistrate proceeds to try him. It corresponds to an indictment found by a jury, or perhaps still more nearly to the record to be drawn up by the Crown Prosecutor under sec. 827 of the Code, where an accused person elects for speedy trial before a Judge without a jury.

Although the omission from the information of such ingredients as were omitted in the present case might well be fatal to the validity of a summary conviction, the position is quite different, in my opinion, where the conviction is had for an indictable offence in respect of which a charge has been properly formulated under sec. 778 of the Code. The information and conviction in the former case constitute the record; in the latter the information is entirely superseded by the formulated charge prepared by the magistrate, and this document, with the plea of the accused and the magistrate's adjudication, together with the consequent conviction, form the record. In my view, therefore, the omissions from the information complained of in the present instance do not affect the validity of the conviction, which follows precisely in its terms the charge as formulated by the magistrate.

The warrant of commitment, follows the form of the information. It, however, states that the offence for which conviction

tion was had was a breach of sec. 521 of the Code. Here the persons to be informed by the warrant are the keeper of the prison and any Court before which the matter may come upon *habeas corpus*, and it may be presumed that they would be sufficiently informed of the charged offence by the statement in the warrant that the convict "did unlawfully and wilfully damage, by breaking, four insulators on telegraph poles, the property of the Canadian Pacific Railway Company," when taken with the averment that the offence was contrary to the provisions of sec. 521 of the Criminal Code. The warrant of commitment would be, in my opinion, quite sufficient; but, if not, a valid and regular conviction having been shewn, opportunity would be afforded, almost as of course, to permit of a warrant of commitment in strict conformity with the conviction being lodged with the keeper of the prison.

The objections to the sufficiency of the information and warrant are highly technical and quite lacking in merit, because the record shews that the charge formulated by the magistrate and read over to the accused, and to which he pleaded guilty, was in the precise terms of the conviction, and described the offence in the exact language of sec. 521.

Mr. Tremear urged that the punishment imposed—nine months in the Central Prison at hard labour—was excessive. That question cannot be considered on this application. But if it could, it is only necessary to reflect that the safety of passenger trains, carrying some times hundreds of human beings, may often depend upon the efficiency, at a critical moment, of the electric telegraph line of a railway company, to realize what a serious offence a wanton and mischievous interference with such a telegraph line really is. If mere negligence, jeopardizing human life, is to be regarded as criminal and something that should be severely punished, *a fortiori* a wanton and reckless destruction of what may be the sole protection of the lives of travellers and trainmen, certainly cannot be deemed a light or trivial offence. In my opinion the punishment inflicted, assuming the conviction to have been properly made, cannot be characterized as too severe.

The motion for the discharge of the prisoner fails, and he will be remanded to custody.

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IN RE CHARLES H. DAVIES, LIMITED. McNICOL'S CASE.

Feb. 19

*Company—Contributory—Holder of Certificate of Shares as Security Only.*

The appellant, who agreed to take one share in a company, received and accepted a certificate of five shares expressed to be fully paid up, four of which the managing director of the company informed him were intended only as security for certain paper to which he had become a party for the accommodation of the company. No stock was subscribed for by, or allotted to, him, but a dividend on the one share was paid to him:—

*Held*, that he was a contributory in respect to the one share only.

*Bloomenthal v. Ford*, [1897] A.C. 156, followed; *Re Perrin Plow Co.* (1908), 12 O.W.R. 387, distinguished.

THIS was an appeal by one McNicol from the order of J. S. Cartwright, Esq., K.C., an Official Referee, placing him on the list of contributories of the above company, under the circumstances mentioned in the judgment. The appeal was argued on February 18th, 1909, before ANGLIN, J.

*R. S. Robertson*, for the contributory.

*R. H. Parmenter*, for the liquidator.

February 19. ANGLIN, J.:—The contributory appeals from the order of the Official Referee placing him upon the list of contributories. The only evidence before the learned Referee was that of McNicol himself, and, in his judgment, the Official Referee does not discredit McNicol as a witness. His story is that C. H. Davies, who was managing director of the Charles H. Davies, Limited, saw him, on behalf of the company, for the purpose of inducing him to take stock. McNicol at first refused. Davies then offered to take some insurance through McNicol, and upon this inducement McNicol agreed to take one share. Davies wished him to take five shares, but McNicol refused. Davies then asked McNicol to give an accommodation note for \$400, which McNicol agreed to do. Davies brought him a stock certificate for "five shares of the par value of \$100 each, fully paid, of the capital stock of Charles H. Davies, Limited," telling him that, as to four of the five shares, they were to be security for the accommodation note which McNicol was asked to give. Upon this understanding McNicol took the certificate. The company drew upon him for \$100, which he paid. When McNicol's note for \$400 matured,

Davies wanted him to renew. McNicol renewed, Davies giving him a note for the same amount to shew that McNicol's note was for accommodation. When McNicol's note again matured, Davies wished it again renewed, but McNicol refused to renew it. Davies then asked him to split the note in two, and McNicol thereupon gave him a note for \$200, but did not get back the \$400 note. When the \$200 note matured, Davies asked for its renewal, and McNicol refused. Davies then drew upon McNicol for \$200. McNicol at first refused to accept, but finally accepted, getting from Davies a note for the same amount, as he says, to shew that the acceptance was for accommodation. Two of the notes signed by Davies in favour of McNicol are produced; also the draft for \$100 paid by McNicol and the \$200 draft accepted, but not paid; the other notes have been lost.

There was no subscription or application for stock by McNicol, and no allotment of stock to him. He attended some of the company's meetings, and accepted a dividend in respect of the \$100 paid by him, but, inasmuch as he is admittedly a holder of one share, these acts are equivocal, and cannot create an estoppel against him. McNicol certainly never thought he was acquiring more than one share in the company. As to the other four shares, he thought he was obtaining security for a loan which he was making, presumably to, or for the benefit of the company. It was so represented to him by the company's general manager, who was acting as its agent in the sale of its stock. The company issued to McNicol a certificate in which the shares were described as "fully paid." In most of these particulars the case differs entirely from *Re Perrin Plow Co.* (1908), 12 O.W.R. 387, on which the learned Referee relies. There, although at first unwilling, the contributory, Allen, eventually became an applicant for the whole number of shares in respect of which he was held. These shares were duly allotted to him; he took them and gave his note for them, relying on the undertaking of two persons interested in the promotion that they would pay the note for him by instalments. The shares were issued direct to him, and he received dividends upon them and gave a proxy in respect of them. He was held liable as a shareholder.

The present case is, in my view, not distinguishable in principle from *Bloomenthal v. Ford*, [1897] A.C. 156. In that case the

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person sought to be made contributory had lent money to a limited company, upon the terms that he should have as collateral security, fully paid shares in the company, and the company handed to him certificates for 10,000 shares of one pound each. No money had in fact been paid upon the shares, which were issued from the company direct to the lender, but he did not know this, and believed the representation that they were fully paid shares. An order having been made to wind up the company, he was placed upon the list of contributories, but it was held in the House of Lords that, since the company had obtained the loan by a representation that the shares were fully paid, which the appellant believed and acted upon, the company and the liquidator were estopped from alleging that the shares were not fully paid, and that the appellant was entitled to have his name removed from the list of contributories.

The representation made in this case by the accredited agent of the company was similar to the representation in the *Bloomenthal* case. Money was lent for the benefit of the company through its agent, as in the *Bloomenthal* case. The company issued its certificate for fully paid shares, upon the faith of which the note representing the loan was renewed, and subsequently allowed to stand, the lender believing that he had received security for his claim. Instead of receiving security the liquidator maintained that he had subjected himself to a considerable liability. The facts of these two cases are sufficiently similar to render them practically indistinguishable. Upon the authority of *Bloomenthal v. Ford*, which was not referred to in the judgment of the learned Referee, and which he informs me was not cited to him, the appeal must be allowed, and the order placing McNicol on the list of contributories reversed. The appellant is entitled to his costs of this appeal and of the application to place him on the list of contributories.

A. H. F. L.

[IN CHAMBERS.]

BLAYBOROUGH V. BRANTFORD GAS CO.

1909

Feb. 20.

*Negligence—Death of Adopted Child—Fatal Accidents Act—Con. Rule 261.*

The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under the Fatal Accidents Act, R.S.O. 1897, ch. 166, sec. 1, sub-sec. 2.

THIS was a motion, under Con. Rule 261, to strike out a statement of claim as disclosing no cause of action. The motion was argued before ANGLIN, J., in Chambers, on February 19th, 1909.

C. S. McInnes, K.C., for the defendants.

W. J. McCarthy, for the plaintiff.

February 20. ANGLIN, J.:—The defendants move, under Rule 261, to strike out the statement of claim in this action on the ground that it discloses no cause of action against them. The action is brought by the plaintiff, on behalf of himself and his wife, Charlotte Blayborough, to recover damages for the death of their adopted son.

The defendants contend that the death of an adopted son, though caused by negligence, gives no cause of action to the persons whose adopted child it was. Any right of action to recover compensation for the death of persons killed by negligence is purely statutory, and the statute R.S.O. 1897, ch. 166, provides that the action shall lie "for the benefit of the wife, husband, parent and child of the person whose death has been so caused." Parent is defined to "include father, mother, grandfather, grandmother, stepfather and stepmother." It does not include persons whose adopted child has been killed. Even the mother of an illegitimate child is not within its terms: *Gibson v. Midland R.W. Co.* (1883), 2 O.R. 658; *Dickinson v. North Eastern R.W. Co.* (1863), 2 H. & C. 735. "The law of England, strictly speaking, knows nothing of adoption, and does not recognize any rights, claims or duties arising out of such a relation, except as arising out of an express or implied contract:" *Eversley on Domestic Relations*, 3rd ed., 174. This statute, creating a new cause of action, "must be strictly followed, and it

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is only those named in the statute as persons entitled to bring the action who can bring it." "The Courts will not, by any liberality in the construction of the language of the Act, extend it to cases, or for the benefit of persons, not coming within its precise terms:"

*McHugh v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 600, 602, 606.

In my opinion the statement of claim in this action discloses no cause of action against the defendants, and should be struck out under the provisions of Rule 261. It follows that the action must be dismissed, and with costs, if, in the circumstances, the defendants ask costs.

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[LATCHFORD, J.]

RE BROWN ESTATE.

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Feb. 23.

*Will—Devise of rents to wife, subject to annuity—Death of annuitant—Amount of rent payable to wife—Amount raised to pay debts—Proportion of same.*

A testator, after directing payment of his debts, bequeathed to his wife his household furniture, and the "balance of the rents arising or accruing" from his homestead farm, after payment thereout and therefrom of \$200 per annum to a daughter during her lifetime. He then devised the farm to two grandsons, who "were not to receive or to be allowed the possession thereof" until after his wife's death. The testator owned another farm, which he devised to another daughter. The daughter died in the lifetime of the testator. The executor, for the payment of debts, was obliged to raise \$200, while for the repairs of the homestead farm, a yearly expenditure of \$30 would be required:—

*Held*, that the widow was entitled to the whole of the rent of the homestead farm, subject to any expenditure for repairs, and that the annuity to the daughter did not fall into the residuary estate.

*Held*, also, that the amount raised for the payment of debts, was chargeable on the whole of the testator's realty proportionately to the respective interests of the parties in the two farms.

THIS was an application on behalf of Abraham Winger, the executor under the will of Joseph Brown, deceased, pursuant to Con. Rule 938, for an order construing the will and for the opinion of the Court, pursuant to sec. 37 of the Act respecting Trustees and Executors.

The matter was argued on the 20th day of January in the Weekly Court at Toronto, before LATCHFORD, J., in whose judgment the material portions of the will are set out.

*William Cook*, for the motion.

*G. H. Gray*, for Leonard Brown, Arthur Brown, and Catherine Quantz.

*H. R. Frost*, for the widow.

February 23. LATCHFORD, J.:—The testator, after directing payment of his debts, devised to his wife his household furniture, which was of trifling value, and "the balance of the rents arising or accruing" from his homestead farm, "after payment thereout and therefrom of the sum of \$200 per annum" to his daughter, Susannah Brown, during her lifetime. He bequeathed the homestead farm to his grandsons, Leonard and Arthur Brown, but they "were not to receive or be allowed possession thereof



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until after my wife's death, and my executors shall rent the said farm in the meantime and pay the net proceeds from the said said rents as herein directed." The residuary estate was devised to Susannah Brown. The homestead farm at the time the will was made and when the testator died, was under lease at \$400 a year.

Susannah Brown died in the lifetime of the testator. At the time of his death Joseph Brown owned, in addition to the homestead farm, a farm of sixty-three acres, which he devised to his daughter, Catherine Quantz. His personal estate amounted to \$198. To pay the debts of the deceased the surviving executor, Abraham Winger, was obliged to borrow \$250, in addition to the \$198 which was available. It will, it appears, be necessary to expend at least \$30 a year for the repair of the buildings and fences on the homestead farm, which still brings in an annual rent of \$400.

The first question to be determined is whether, under the bequest of the "balance of the rents," the whole of the rents received by the executor are payable to the widow of the testator or only the balance after \$200 has been deducted annually.

It is to be observed that the bequest to the wife is not of the balance of the annual rent, but "the balance of the rents arising or accruing from my homestead farm . . . after payment thereout and therefrom"—that is, out of such rents and from such rents—"of the sum of \$200 per annum to my daughter, Susannah Brown, during her lifetime." The rents are, I consider, treated as a whole. The testator, in so referring to the rents, manifests the "contrary intention" which prevents the rule in regard to specific legacies from applying: Theobald on Wills, 6th ed., 155. Whatever balance of such rents may remain after payment of the annuity for life to the daughter is devised to the wife. The term during which the \$200 should be paid to the daughter might be short or long. If that term continued until the death of the testator's widow, the balance of the rents which the widow would receive would be the difference between \$200 for that number of years and the total rents. If the daughter lived but a short time, the "balance of the rents" would be the difference between \$200 a year for that time and the total rents. Had the daughter survived the testator for a year, the deduction

would amount to only \$200, and the balance of the rents bequeathed to the widow to the difference between that sum and all the rents received by the executor from the homestead farm during the widow's lifetime. As a result of the death of the daughter in the testator's lifetime, the "balance of the rents"—"the net proceeds"—amount, I think, to the whole of the rents, and the widow is entitled to be paid the rents of the homestead farm. The \$200 annuity to Susannah Brown does not fall into the residuary estate.

The repairs necessary to keep the buildings and fences on the homestead farm in the state in which they were in at the death of the testator should be paid by the executor out of the rent and charged against the widow. Apart from such necessary expenditure, the widow is entitled to the rents during her lifetime.

The personalty being exhausted, the debt of \$250 is a charge upon the realty in the proportions in which the widow, the devisees in remainder of the homestead farm, and Catherine Quantz benefit under the will. If the parties cannot agree, there will be a reference to the official referee to determine the amount to be contributed by each.

Costs of all parties out of the estate; those of the executor, as between solicitor and client, when paid, to be added by executor to present debt, and satisfied by the parties mentioned in the proportions stated.

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## [DIVISIONAL COURT.]

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RE JOHNSON AND KAYLER.

Oct. 15.  
Oct. 22.

*Division Court—Mandamus—Jury Trial—Nonsuit after Verdict—Powers of Judge—62 Vict. ch. 11, sec. 9 (O.).*

In a Division Court suit tried with a jury, the Judge reserved judgment on a motion for nonsuit, subject to which he took the findings of the jury, and subsequently granted the nonsuit on the ground that there was no evidence to go to the jury. The plaintiff then applied for a mandamus, requiring the Judge to enter judgment for the plaintiff upon the findings of the jury:—

*Held*, affirming the order of Anglin, J., that under the provisions of 62 Vict. ch. 11, sec 9 (O.), the Judge had jurisdiction to nonsuit the plaintiff, although the jury had rendered their verdict.

*Re Lewis v. Old* (1889), 17 O.R. 610, not followed, having been decided before the passing of the statute above referred to.

APPEAL by plaintiff from order of ANGLIN, J., refusing a mandamus to the Judge of the 8th division court in the county of York, requiring him to enter judgment for the plaintiff under the circumstances mentioned in the judgments.

The motion before ANGLIN, J., was argued on October 9th, 1908.

*John McGregor*, for the plaintiff.

*Gideon Grant*, for the defendant.

October 15. ANGLIN, J.:—The plaintiff moves for a mandamus to the Judge of the 8th division court in the county of York, requiring him to enter judgment for the plaintiff upon the findings of the jury in this action. At the trial a motion for nonsuit was made, and Mr. H. E. Irwin, K.C., who was acting as division court Judge, at the request of His Honour Judge Morgan, reserved judgment upon the motion. He took the findings of the jury subject to the reserved motion, and subsequently delivered a judgment, holding that there was no evidence to go to the jury in support of the plaintiff's claim; and he thereupon dismissed the action.

Mr. McGregor, on behalf of the plaintiff, contended (1) that the learned Judge had granted the nonsuit upon a ground not taken and not reserved at the trial; and (2) that his holding that there was no evidence to go to the jury was erroneous.

As to the first point, Mr. McGregor urged that the motion for nonsuit at the trial was based solely upon the contention that the plaintiff, having found it necessary to call the defendant to prove part of his case, was bound by all the evidence given by the defendant upon cross-examination as well as on examination-in-chief. Mr. McGregor filed an affidavit, in which he states that this was the only ground upon which nonsuit was asked for, and that this was the only point upon which motion for nonsuit was reserved by the learned acting Judge at the trial. He contends that the Judge of the division court, when trying a case with a jury, has not the right to nonsuit after verdict, and that if he has such power, it must be upon grounds reserved by him before verdict. Mr. Grant, on the other hand, contends that under 62 Vict. ch. 11, sec. 9, a division court Judge has the same powers as to nonsuit as are possessed by a Judge of the High Court in the trial of jury cases.

At the close of the argument I stated that I desired a certificate from the acting Judge as to the questions which he did, in fact, reserve upon the motion for nonsuit. The defendant has now furnished that certificate, and it is to the effect that the learned acting Judge "reserved judgment upon the whole question whether there was evidence to go to the jury." I must accept this certificate as conclusive upon this point. Having reserved the whole question as to whether there was any evidence to go to the jury in support of the plaintiff's claim, the learned acting Judge had, in my opinion, jurisdiction to dispose of that question after the verdict had been rendered. Mr. McGregor's first ground therefore fails.

As to his second ground, it is impossible for me, without sitting in appeal from the learned acting Judge, to determine whether or not there was evidence to be submitted to the jury. It was within the jurisdiction of the learned Judge to determine that question, and he has determined it adversely to the plaintiff. That adjudication is not open to review.

The application for mandamus therefore fails, and will be dismissed with costs.

From this judgment the plaintiff appealed, and the appeal

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was heard on October 21st, 1908, by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

*John McGregor*, for the plaintiff.

*Gideon Grant*, for the defendant.

October 22. The judgment of the Court was delivered by BOYD, C.:—The plaintiff could not prove the receipt of any money by the defendant to which he was entitled but by calling the defendant. And the defendant, being so called for the plaintiff, proved, as certified by the Judge, that he received a cheque for \$275 from the solicitor of the plaintiff, with instructions to retain \$75 for his services and to pay \$200 to the plaintiff. To this there was no contrary evidence given, and upon this state of the testimony I think that the trial Judge might well be of the opinion that there was no evidence to go to a jury, and so direct a nonsuit. The statement of the doctor as to the way he received the money is not to be split into parts, and credit given to one and discredit to the other. He might have been discredited by calling the solicitor, but without that the evidence was all one way, and in the High Court the case would have been withdrawn from the jury. I proceed upon the provisions of the statute 62 Vict. ch. 11, sec. 9, amending the Division Courts Act, and giving express power in jury cases to nonsuit or dismiss at the close of the plaintiff's case or after hearing the whole evidence.

*Re Lewis v. Old* (1889), 17 O.R. 610, proceeds upon the ground that the Judge in the division court had no power in a jury trial to withdraw the case from the jury so far as the defendant is concerned (p. 611). It is put by the Divisional Court on the ground that the right to have the case submitted to the jury was an absolute statutory right—a violation of which was matter for prohibition. That right as to defendant is not interfered with by the amended statute, but as to the plaintiff's case it gives the Judge jurisdiction to act as he did.

The judgment should be affirmed with costs, as the situation is not one for a mandamus.

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## [DIVISIONAL COURT.]

## MELADY V. THE JENKINS STEAMSHIP CO.

*Contract—Carrier—Carriage by Water—Bill of Lading—Weights and Measures—Bushel—Canadian Standard or American Standard—Applicability of—Compulsory Payment—Freight—Action for Excess—Contract by Telegram.*

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An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lading signed by him at the port, which stated "rate of freight as per agreement."

*Held* (MAGEE, J., dissenting), that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract.

Where, on delivery by vessel of cargo, freight in excess of the amount due was paid as demanded, without protest:—

*Held*, that nevertheless such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of non-delivery to purchasers, would have been incurred; and the excess paid was recoverable by action.

A contract by telegram is made at the place where the telegram of acceptance is sent from.

THIS was an appeal by the defendants from the decision in favour of the plaintiffs of His Honour Judge Morgan, a Judge of the county court of the county of York, under the circumstances mentioned in the judgment, where the facts of the case are fully stated. The appeal was argued before BOYD, C., BRITTON and MAGEE, JJ., on January 19th and 20th, 1909.

G. R. Geary, K.C., for the defendants, contended that the law of the United States was in the mind of the contracting parties, and that the plaintiffs ought to have known that Prenderville had the American standard in his mind: *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; that there is no authority to change the contract: *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67, at p. 73; that the law to govern is that of the place where the contract is to be performed: Dicey's Conflict of Laws, 1st ed., pp. 569-570; *Scott v. Bevan* (1831), 2 B. & A. 78; *The Skandinav* (1881), 51 L. J. P. D. & A., 93; Story's Conflict of Laws, 8th ed., p. 367, sec. 272 (a).

W. N. Ferguson, K.C., for the plaintiffs, contended that the word "bushel" in the bills of lading must be given its ordinary meaning in Canada unless something to the contrary is contained in them; that the law of the place where the contract was made should govern: Dicey's Conflict of Laws, 2nd ed., p. 560 *et seq.*; Wharton's Conflict of Laws, 3rd ed., p. 919; *Spurrier v. La Cloche*, [1902] A.C. 446,

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at p. 450; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; as to the completion of the contract: *Baston v. Toronto Fruit Vinegar Co.* (1902), 4 O.L.R. 20; *Cole v. Sumner* (1900), 30 S.C.R. 379; *Harvey v. Facey*, [1893] A.C. 552; *Johnston Bros. v. Rogers Bros.* (1899), 30 O.R. 150.

*Geary*, in reply, referred to Wharton on Conflict of Laws, 3rd ed., p. 866; Dicey on Conflict of Laws, 2nd ed., p. 560; *Rosseter v. Cahlmann* (1853), 22 L.J. Ex. 120.

February 9. BOYD, C.:—The defendant company, carriers, and owners of the steamship "Squire," contracted with the plaintiffs to carry a quantity of oats specified from Fort William, in Ontario, to Buffalo, in the United States, at the rate of 2½ cents per bushel.

Bills of lading were signed in respect thereof directing their delivery to the Bank of Hamilton, and these were indorsed by the bank to the plaintiffs, merchants in Toronto, owners of the oats.

Upon claiming delivery the defendants charged freight at the rate of 2½ cents upon each 32 pounds, the American standard of measurement, which they claimed to be a bushel within the meaning of the contract. The plaintiffs, contending that the Canadian standard of 34 pounds to the bushel was what the contract meant, paid the whole amount demanded, \$2,607.74, and now bring suit for recovery of the excess claimed to be paid, *i.e.*, \$153.

The agreement for carriage was made by telegrams and correspondence from Chicago to Toronto, through Prenderville & Co., agents for the owners of the vessel, the defendants, in the United States, to the plaintiffs at Toronto; and it was briefly expressed: "Charter for one compartment for about 90,000 oats to Buffalo at 2½ per bushel." If anything turns upon it, this contract was completed at Toronto, and is to be treated as a contract made in Canada. The cases are cited by my brother Magee.

The oats were delivered on board the steamer at Fort William, and bills of lading given and signed by the master of the ship, also the agent of the defendants, which accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel. That is indicated by the figures giving quantities upon the face of the bills, and it is to my mind the turning point of the appeal. On these bills it is also said, "Rate of freight as per agree-

ment." The documents are thus to be read together. One is incorporated with the other, and there is no inconsistency or discrepancy between them. The agreement specifies the rate of freight to be paid on each bushel, but that term "bushel" is vague or ambiguous so far as weight is concerned; that is to say, there is an American bushel of oats equalling 32 pounds and there is a Canadian bushel equalling 34 pounds. This is a Canadian contract, and *primâ facie* I should say the parties contracted as to the Canadian standard of measurement being applied to a Canadian (Manitoba) product shipped from a Canadian port. The silence of the contract as to the method of measurement may be made intelligible by evidence of usage or custom, or other evidence not contradictory of what is expressed therein: see *Russian Steam-Navigation Trading Co. v. Silva* (1863), 13 C.B.N.S. 610. The bill of lading may therefore be properly used for this purpose. No evidence is given by the defendants, or by the master of the ship, or the agents of the ship-owners who mediated the terms at Chicago. In general the powers of the master as agent are as given by Lord Chelmsford in *McLean v. Fleming* (1871), L.R. 2 H.L. Sc. 128, at p. 130: "The bills of lading signed by the master were *primâ facie* evidence that the quantities . . . mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship . . . . As it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them."

In the last edition of Smith's Mercantile Law, (11th ed.,) vol. 1, p. 426 (1905), it is stated: "Unless the mode of calculating the weight or measurement of the cargo is indicated by the contract itself or the usage of the particular trade, it seems that freight will be payable according to the mode of computation at the port of lading." He cites the case from which I proceed to quote. Bowen, L.J.A., in *Spaight v. Farnworth* (1880), 5 Q.B.D. 115, at p. 118: "Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculations of freight . . . . There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measurement figures

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arrived at at the port of lading." This language indicates to my mind that it is quite within the competence of the master to accept the freight on the footing of a 34-pound-to-the-bushel standard of measurement; and, failing all other evidence, that his signature to that effect binds his principal, the present defendants. Thus reading the prior agreement and the completion of its unmentioned but necessary terms in the bill of lading, I do not need to resort to any consideration as to the cases cited to us on the conflict in private international law. The complete contract is governed and is to be interpreted by its own terms, which upon all the evidence given entitles the plaintiffs to succeed.

The first defence set up, that the contract was for payment of freight at the rate of 32 pounds to the bushel, is, I think, negatived. The second defence, that the over-payment was made voluntarily and can not be recovered, is amply answered by the decision in *Shand v. Grant* (1863), 15 C.B.N.S. 324, which in its facts as to the payment is on all fours with the present. The same point as to the recovery of unpaid freight was long ago decided in *Geraldes v. Donison* (1816), Holt 346.

The judgment should be affirmed and the appeal dismissed with costs.

BRITTON, J.:—The plaintiffs, by their agents at Fort William, shipped on board the defendant's vessel, the "F. B. Squire," a large quantity of Manitoba oats, called 98,163 $\frac{3}{4}$  bushels, to be carried from Fort William to Buffalo. There was an agreement between the parties that the freight on these oats was to be 2 $\frac{1}{2}$  cents per bushel. This contract, as to rate, was made by plaintiffs through Prenderville & Son, agents for the defendants at Chicago. Prenderville & Son resided at Chicago, and the plaintiffs knew that they were, and for years had been, recognized freight brokers at Chicago, and then acting for the defendants. The contract as to rate, and that the oats were to be carried, was made by correspondence, which ended by Prenderville & Son confirming charter for space on the steamship "Squire" for quantity of about 90,000 bushels of one-grade oats, at 2 $\frac{1}{2}$  cents a bushel. Nothing was said by either party in this correspondence as to number of pounds to a bushel of oats. As a matter of fact, 34 lbs. to the bushel is Canadian standard and 32 pounds to the bushel is United States

standard. The further facts are that the steamer "Squire" was of United States registry, and her owners had their residence and chief place of business in the United States. The oats were Canadian oats, and at time of contract were, and were shipped at Fort William.

The whole facts distinguish this case from cases cited, and present some questions of nicety and difficulty for determination.

The correspondence as to rate of freight,—as to vessel space, and for carrying the oats from Fort William to Buffalo, between the plaintiffs at Toronto and the agents of the defendants at Chicago, was not the whole of the contract. The oats were shipped at Fort William by the plaintiffs' agents, and received by the captain of the defendants' vessel, under bills of lading which added other terms, so that the whole contract, made in part with the defendants at Chicago and in part with the defendants' agent at Fort William, must be looked at. The plaintiffs' agents at Fort William were Coffee, Hargraft & Co., and they shipped these oats, consigned to the Bank of Hamilton, Buffalo, pursuant to the terms of eleven bills of lading, all of the same tenor, and subject to these special conditions:—

"(a) Rate of freight as per agreement.

"(b) All deficiency in the cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee.

"(c) In case the grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay all deficiency exceeding five bushels for each 1,000 bushels."

Then the shipment of the whole of the oats in question, as mentioned in the eleven bills of lading, was in fact made according to the Canadian standard of 34 pounds to the bushel. In one shipment, part of the total of  $98,163\frac{3}{4}$  bushels, special attention was called to the standard, as that shipment consisted of  $3,163\frac{3}{4}$  bushels. These bills of lading were signed by the captain of the "Squire," who was defendant's agent for the purpose.

The oats were safely carried to Buffalo, and upon their delivery there, freight was claimed by the vessel, and paid by agents of the consignees, at the rate of  $2\frac{1}{2}$  cents per bushel of 32 pounds, instead of per bushel of 34 pounds.

I think as to quantity the defendants are bound by the bills

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of lading. It is somewhat singular that in a commercial case, and in reference to what one would suppose to be an almost every-day occurrence in shipping circles, no recent case could be cited upon the precise point involved.

There is a case which is the converse of the present and which is applicable: *Moller v. Living* (1812), 4 Taunt. 102. That was an action for freight. The bill of lading of a cargo shipped at Dantzic on board a Prussian vessel, expressed it to be 100 lasts in 2,092 bags. The consignee had purchased it for that quantity in English measure, but it did not amount to that quantity by the Dantzic measure, which is larger. Held, that the master was entitled to the freight according to the measure in the bill of lading and exceeding the freight computed by the Dantzic measure. Mansfield, C.J., said, at p. 104: "We are of opinion that we cannot distinguish this contract from the usual case of written contracts, where there is no ambiguity, and that on this contract the captain has agreed to carry, and the freighter has agreed to pay for, the quantity mentioned in the contract, and that is 100 lasts; that they are bound by the words of this bill of lading as they would be by any other written instrument; and that it is irrelevant for them to inquire whether it is Dantzic measure or English measure; the instrument describes not merely 100 lasts, but 100 lasts very specifically mentioned as contained in so many bags; and I am of opinion that if evidence had been offered, as in truth it was not, for shewing what was the real quantity, it ought not to have been received."

This is not the simple case of payment of a certain sum of money in a foreign country. Payment in such a case would be in the currency of the country where it is payable, and assuming in the present case the freight to be payable upon delivery of the oats at Buffalo, payment would be in the currency of the United States, but payment for what quantity? That depends upon the contract made at Fort William. The oats were in bulk; it was a cargo of oats which consisted in fact at that port of  $98,163\frac{3}{4}$  bushels at 34 pounds to the bushel, and the master of the vessel received them, as of that quantity, and so can charge freight only on that quantity.

Then, I think the intention of the parties, as gathered from all the evidence, was that the measurement of oats put on board

the boat was to be taken as the measurement on which freight was quoted, and was to be paid.

*Spurrier v. La Cloche*, [1902] A.C. 446, is authority for the proposition that (at p. 450) "where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion, by which law its interpretation and effect are to be governed."

My decision is not in conflict in any way with the decision in *Rodocanachi v. Milburn*, 18 Q.B.D. 67, that in the absence of express provisions to the contrary, as between the shipowners and the charterers, only the charter party could be regarded as constituting the contract, and the bills of lading must be looked upon only as a mere receipt for the goods. Here the contract for rate of freight, and for mere transportation, does not cover what is in the bill of lading, and what is in the bill of lading is supplemental to, and not inconsistent with, the correspondence part of the contract, as part of the entire contract between the parties.

I regard this as different from the sale of the oats. If sold in Canada to be delivered in the United States, and sold according to measurement, and measurement not expressly mentioned or defined, measurement at the place of delivery must prevail, but there was in this case delivery to the defendants in Canada for the purpose of this contract.

*Lloyd v. Guibert*, L.R. 1 Q.B. 115, was cited by counsel for the defendants. That case decides, at p. 129, that "where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs should govern." I find this not against the plaintiffs' contention here, but rather in favour of it, on general principles. The case is a most instructive one. Willes, J., in giving judgment, after discussing the diversity of opinion and conflict of laws in regard to maritime matters, says, at p. 123, "that the rights of the parties to a contract are to be judged of by that law by which they intended—or rather by which they may justly be presumed to have bound themselves." Again he says, at p. 127: "Further, it must be remembered that although bills of lading are ordinarily given at the port of loading, charter parties are often made elsewhere, and it seems strange and unlikely to have been within the contemplation of the parties that their

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rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and secondly, if she were taken up elsewhere, according to the law of the place where the charter-party was made, or even ratified."

The case of the "*Skandinav*" (1881), 50 L.J.N.S., P.D. & A., p. 46, would seem a strong case in the defendants' favour if the headnote of the case was wholly warranted by the decision—even if the first decision had stood. In that case by the charter-party it was agreed that the "*Skandinav*" should proceed to a good and safe port in Westervicks customs-house district, and there load a full and complete cargo of props and proceed to a safe port on the east coast of Great Britain, and deliver the same on being paid freight at and after the specified rate—all British Sterling—in full per 180 English cubic feet, taken on board as per Gothenburg custom. The cargo was taken on board not measured; the owners refusing to measure. The master attempted to get a lump sum for freight, which was positively refused, and the master was told that he must submit to the measuring in Hull of the "*Skandinav*'s" cargo. The master then accepted the bill of lading, adding these words to it: "Number of pieces, measure and quantity unknown, free from damage; cargo to be measured up at port of discharge at charterer's expense, according to his telegram." Sir R. J. Phillimore decided, on appeal from the county court Judge, that the words quoted must be construed to mean, "loaded on board according to the custom of loading at Gothenburg," and that the contract was, "to be laden on board according to the custom at Gothenburg, but to be measured at the port of delivery according to English measurement." On appeal, Sir R. J. Phillimore was reversed—see 51 L.J.P.D. & A. 93—and it was held that the Court must adopt a construction which has a meaning with reference to the facts of the case. It was proved that there was a particular custom or method of measuring props in use at Gothenburg. There was no other custom to which the words in the charter-party could apply but that custom, so the measurement, according to that Gothenburg custom, was made at Hull. This decision does not establish any rule. It is a decision as to the construction to be put upon certain words in the bill of lading. There is nothing in that case against my view that the facts in the case in hand

warrant the conclusion that the determination of the number of pounds to a bushel, or what constitutes a bushel, on which plaintiffs were to pay freight, is to be according to the standard of measurement at port of shipment.

I repeat, there is a difference between a contract to carry and a contract of sale of goods to be delivered in a foreign country. In a contract with a carrier it is an incident that the freight is only payable upon arrival at the port of discharge, but delivery, for the purpose of the contract to carry, is made, and the quantity generally determined, on shipment. It was so in this case, but because the vessel must fulfil its contract, and must satisfy the owners of the cargo that they have done so, the cargo must be weighed or measured out at the end of the voyage; especially so in this case, where it is part of the contract to pay for shortage, and to get payment for excess, and to deliver all, even in case of grain damaged *en route*.

This case seems to me to be within the rule stated in *North-West Transportation Co. v. McKenzie* (1895), 25 S.C.R. 38, where it was held that the whole of what took place must be looked at to find the true contract. The undisputed facts are, that the defendants were bound to furnish a vessel of about 90,000 bushels capacity, and that the plaintiffs need not furnish a cargo of more than "about 90,000 bushels"; that the quantity actually carried was 98,163 $\frac{3}{4}$  bushels by the larger measure; that the rate was fixed at 2 $\frac{1}{2}$  cents a bushel; that a bushel might be one of 32 pounds or one of 34 pounds; that the master of the vessel assumed to take the oats on board at 34 pounds to the bushel. Upon these facts, the intention to carry at 2 $\frac{1}{2}$  cents per bushel of 34 pounds must be inferred, and the owners of the vessel must be bound by the captain's act in signing these bills.

The defendants say that in any event, as the money was voluntarily paid it cannot be recovered. When the oats arrived at Buffalo, the freight was paid in the usual course by or on behalf of the consignee and for the plaintiffs, as demanded by the captain of the vessel. The learned Judge says the freight was paid under protest. I do not find that there was any protest at time of delivery. In fact, no question or discussion arose then as to the number of pounds to the bushel of oats, and apparently there was

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then no thought of the difference between the Canadian and United States standards. The freight as demanded was paid and charged against the oats, which were sent forward by rail, on their way to the sea. This can hardly be called a voluntary payment. It was compulsory, as unless paid the oats would have been held at Buffalo at large expense for storage, with possible demurrage, and possible loss by reason of non-delivery by the plaintiffs to purchasers in the time agreed on.

This money was paid under a supposed legal obligation to pay. It was paid in mistake or ignorance of fact—as in this case the measurement of the oats: see Leake on Contracts, 5th ed., p. 64; *Newall v. Tomlinson* (1871), L.R. 6 C.P. 405.

There was a claim for the freight on 210 bushels of oats, short delivery. That was properly disallowed by the learned trial Judge. These oats were paid for at the market price of oats at Buffalo. This was in accordance with the contract in the bill of lading. The market price at Buffalo would be at least the market price at Fort William plus the freight to Buffalo, so the plaintiffs, paying for the oats as if delivered at Buffalo, were entitled to the freight to Buffalo on these oats so paid for.

For the reasons above, I think the appeal should be dismissed and with costs.

MAGEE, J.:—If there was a contract in this case it was completely made on October 18th, 1905, between the plaintiffs and the defendants' agents, Prenderville & Son, shipping brokers of Chicago. On that date the latter telegraphed: "We confirm charter one compartment steamer Squire capacity about ninety thousand one grade oats loading about Friday two and half confirm quick." They had been negotiating since October 12th for carriage of varying quantities of oats, 50,000 up to 250,000 bushels, for the plaintiffs, from Fort William to Buffalo. By the words "we confirm," Prenderville & Sons plainly said, "If you accept this no further word from us is needed." The plaintiffs at Toronto did accept by telegraphing "O.K. one compartment ninety thousand." That completed the agreement if the parties mutually understood each other, or if they must be taken to have done so. They might thereafter dispense with bills of lading or they might dispute over their terms, but this contract was binding, and the shipmaster could not, without authority from his employers, the

defendants, change it: *North-West Transportation Co. v. McKenzie*, 25 S.C.R. 38; *Pearson v. Göschen* (1864), 33 L.J.C.P. 265; *Rodocanachi v. Milburn*, 18 Q.B.D. 67; *The Canada* (1897), 13 Times L.R. 238; *Harris v. Carter* (1854), 3 E. & B. 559. The subsequent bills of lading of October 21st form no part of the contract as to the defendants' remuneration thus settled. Those bills did crystallize into terms mutually satisfactory, what each party understood to be the conditions and risks of shipment implied in their bargain of three days before, but if they had not agreed the law would have implied such as were proper. So far as concerns the question here involved, they were in fact no more than receipts or acknowledgments for the quantities of goods therein stated—just as in *Rodocanachi v. Milburn* and *North-West Transportation Co. v. McKenzie*.

The contract being thus closed by those telegrams, where was it made? Had the communication been by post, the mailing at Toronto of a letter of acceptance by the plaintiffs would have effected the necessary assent of both parties and the contract would be deemed to be made at Toronto: *Magann v. Auger* (1901), 31 S.C.R. 186; *Dunlop v. Higgins* (1848), 1 H.L.C. 381; Addison on Contracts, 10th ed., p. 17. The plaintiffs did, in fact, mail a letter on October 19th confirming the acceptance, but for good or ill the telegram had effected that on the previous day. That there might be a difference between the post office and a private telegraph company as the intermediary was recognized by Willes, J., in *Godwin v. Francis* (1870), L.R. 5 C.P. 295, at p. 303, but in *Cowan v. O'Connor* (1888), 20 Q.B.D. 640, it was held that the telegraph was a mere means of communication, as if one were speaking to the other, and that a telegram sent from within the city of London accepting an order by telegraph from outside the city completed the contract within the city and gave jurisdiction to the mayor's court. On the same principle this contract, if any, was made in Toronto. This conclusion seems also to be in accord with most of the American authorities. See 9 Cyc. 295.

In interpreting the contract, as also in ascertaining what law should govern it and their rights under it, we have to ascertain the intention of the parties. In so far as they have expressed themselves clearly and without ambiguity, the contract is its own law and its own interpreter. We are to look at all that passed

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between the parties: *North-West Transportation Co. v. McKenzie*, 25 S.C.R. 38. I am unable to discover in this correspondence any thing to shew that these defendants or their agents contemplated a bargain with reference to any bushels other than those known to them—that is, the American bushel of 32 pounds weight. They were, it is true, dealing with Canadians to carry Canadian grain from a Canadian port, and the contract in a legal sense was made in Canada. But they, Americans in an American shipping market, were asked to provide an American vessel to bring that grain to an American port. There was no reason for dealing in Chicago except that it was a shipping market. Twice previously, on October 18th, the plaintiffs telegraphed “bidding” a rate for carriage of 250,000 and 100,000 bushels. Surely an American shipowner might fairly consider that the bushels referred to in those bids were the same sort of bushels as to which he was receiving or making bids with his own countrymen, even though it was to go to a foreign port. In their letters Prenderville & Son speak of their market and “our” boats, and refer to the rates from Duluth, without hinting at any difference in the measures, and they refer to the capacity and space. Now throughout it all the plaintiffs were aware of the difference in the two countries as to the bushel. They had shipped oats from American ports, and always paid on the basis of a bushel of 32 pounds. They had never before shipped oats from a Canadian port to an American port. That trade had grown up within two or three years. Prenderville & Son, in their letter, put in apparently by consent, say they did not know of any difference and thought the bushels were the same—32 pounds—on both sides of the line. The plaintiffs do not claim that Prenderville & Son did in fact know otherwise. Knowing as they did of the different standards, one would have expected the plaintiffs to have called attention to it or made clear what they meant. Also, it is to be noted that nowhere in the correspondence is there any intimation that the oats were going beyond the State of New York. If dealt with there it would be on the basis of American bushels, and they would be subject to duty on the same basis. Possibly all parties, however, had in mind export to Europe, which is what actually occurred. In any case, the freight was to be payable at Buffalo on the quantity delivered there at the most, and for that purpose the cargo would have to be measured there, where apart

from agreement the 32-pound bushel is the standard. No usage in the trade is proved beyond the fact that at Fort William the bushel is 34 pounds and in the United States it is 32 pounds. Knowledge of that usage at Fort William or elsewhere in Canada is not attempted to be brought home to the defendants or Prenderville & Son: *Robertson v. Jacobs* (1845), 2 C.B. 412. The trade in Canadian oats is only two or three years old. In the great commodity wheat there is no difference in the standard, 60 pounds. From the documents themselves, an intention such as the plaintiffs insist on cannot be found in the minds of the defendants.

We have to deal with the case on principle. The difference between these parties is only about six or seven per cent. That, however, might be the difference between profit and loss. It might well be such a difference as in *Keating v. Dillon* (1905), 28 Q.O.R. (S.C.) 323, 2,240 pounds or 2,000 pounds to the ton of coal, or that in *Nielsen & Son v. Nearne & Co.* (1884), 1 Cab. & Ell. 288, where at St. Petersburg 100 feet of deals was really 165 feet. In such a case as the latter would it be reasonable to expect the shipowner asked to provide a vessel with capacity for so many hundreds to provide one with capacity for that many times 165, and should he be liable for damages if on arriving at St. Petersburg he was unable to take all on board?

In *Lloyd v. Guibert*, L.R. 1 Q.B. 115, Willes, J., said, at p. 127: "In favour of the law of Denmark, there is the cardinal fact that the contract was made within Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port." What is done at that stage should be in accord with what is to be done afterwards. Should a party then be asked to do afterwards that which is not supposed to be in contemplation and prepared for from the first? I find nothing to indicate to Prenderville & Son that they were expected to conform to a measurement which they did not know. They were addressed in a commercial language which they understood, and they were not informed that the words were used as those of another language. The plaintiffs, on the other hand, knew of the double meaning.

There being nothing in the correspondence nor in any usage shewn to be known to the defendants or their agents, is there any rule of law under which the defendants are to be held to the 34-pound standard? As between the laws of the various countries

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in which such a contract may be effected or in whole or part performed, the intention of the parties as to which they are to be governed by is, if possible, to be ascertained. It may be the law of the place where the contract is made or that of the place where it, or some part of it, is to be performed, or that of the country to which the ship belongs, or it may be in part one or other. In this case these all resolve themselves into Canadian or American law. If American law is to govern it is conceded that the plaintiffs fail. If Canadian law is applicable it can only be for one or both of two reasons—that the contract was made in Canada or that the cargo was to be loaded in Canada. The former reason may be eliminated. It was a mere chance, it may be said, that the contract was closed here, and the rights of the parties were not intended to depend on that. If instead of accepting Prenderville & Son's offer the plaintiffs had answered offering two cents a bushel and that had been accepted, the contract would have been made in Chicago, and yet the bushel in contemplation of both would be just the same. Its definition could not be intended to fly to and fro with the telegrams.

Then, does Canadian law apply to this question merely because the cargo was to be obtained at Fort William? I find no case, and none was cited, in which the place of loading by itself was taken as the criterion. In *Lloyd v. Guibert*, L.R. 1 Q.B. 115, it was not even argued that it would be. In that case the Court laid down the general rule that where the contract of affreightment does not provide otherwise there, as between the parties to it, the law of the ship should govern in respect of sea damage and its incidents. In *Re Missouri Steamship Co.* (1888), 42 Ch.D. 321, Chitty, J., referred to that decision to shew that the principle upon which it proceeds is applicable not merely to questions of construction and the rights incidental to or arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself, and at p. 328 he said: "It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural and consistent rule." He held that the contract was governed by the law of the flag—that is, of England—but also that from special provisions of the contract it appeared the parties were contracting



with a view to English law. On appeal his judgment was affirmed, the Court of Appeal dealing with the latter ground. Lord Halsbury, L.C., at p. 336, said: "Now, this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship by a British company whose domicile is in England. Those circumstances, though very strong, would, perhaps, not be conclusive." Fry, L.J., at p. 341, says: "England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place." So here Buffalo was the place for final completion. That case was the same as this, with the nationalities reversed.

In *The Wilhelm Schmidt* (1871), 25 L.T. 34, a contract was made in Constantinople in the English language between Germans for a German ship to carry goods from Constantinople to (as ultimately settled) England. Sir R. Phillimore, J., said, at p. 38: "When the place of performance was fixed to be in England, the seat of the contract, to use the expression of foreign jurists, would be in that country, and the law of the country would be the law of the contract."

In *Meyer v. Dresser* (1864), 16 C.B.N.S. 646, Byles, J., at p. 664, said: "In this case the contract, although made in Prussia, was for the delivery of a cargo in England and for the payment of the freight in England. This, therefore, is a case in which the contract is to be interpreted by the law of the country where it was to be performed, not by the law of the country where it was made."

Upon these authorities it must, I think, be taken that this alleged contract was governed either by the law of the flag or the law at Buffalo. That is, in either case, American law. It being then to be interpreted by that law, the plaintiff would fail.

In truth, however, I think the plaintiffs cannot be heard to say that there really was a contract. The two parties never meant the same thing—one had in mind 90,000 bushels of 34 pounds each, the other of 32 pounds each.

In *Smidt v. Tiden* (1874), L.R. 9 Q.B. 446, where the bills of lading said "freight as per charter party," and there were two charter-parties at different rates of freight, each party knowing only of one and each having a different one in mind, the parties were held not to be *ad idem*, and the action for freight failed. In *Raffles v. Wichelhaus* (1864), 2 H. & C. 906, each party had in mind

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a different steamer "Peerless" by which the cotton sold was to arrive, and it was held there was no contract.

In *Keele v. Wheeler* (1844), 7 M. & G. 665, one meant four per cent. bonds and the other five per cent. bonds. And see *Riley v. Spotswood* (1873), 23 C.P. 318.

If there was really no contract, then the defendants would be entitled to a *quantum meruit*, and the plaintiffs have not proved that they paid more, and so the action would fail.

I have been dealing with the rights of the parties as they were up to the loading of the vessel. Did the shipmasters' action or the bills of lading affect the position? Here I have the misfortune to differ from the other members of the Court.

On October 21st the oats were weighed out of the elevator and loaded on the vessel. The total weight was 3,344,738 pounds, which, being divided by 34 gave 98,163 bushels and 32 pounds, and the shipmaster signed ten bills of lading for 9,500 bushels each and one for 3,163 $\frac{32}{34}$  bushels. There is no evidence who prepared the bills. Usually they would be filled up by the shipper, in such number, and for such quantities, and with such names as he desired, and are *prima facie* evidence of quantity against each: Carver on Carriage by Sea, 3rd ed., 55 to 58; as against the master conclusive: R.S.C. 1906, ch. 118, sec. 3; R.S.O. 1897, ch. 145, sec. 5. These bills did not say Canadian bushels, but I do not think they can be read otherwise than if they had. By whomsoever they were filled out they were, as to the quantities, merely an acknowledgment. If they had been expressed in pounds, or kilogrammes, hectolitres, American bushels, or Imperial hundredweights, it would have had no greater effect. I do not know that the master could have refused to sign for any of these denominations. He was taking no part in the bargain as to the freight. The bills expressly abstain from so doing, and say "rate of freight as per agreement." If he was assuming to interfere with the bargain made by his employers the cases I have already referred to establish that he could not. If he was assuming to make a new bargain, that, as between the parties to the old one, would be ineffectual: *Göschén v. Pearson*, 33 L.J.C.P. 265. If, indeed, the plaintiffs had refused to be bound by the old bargain, then he, being in a foreign port, might, perhaps, without prejudice to it, make a new one with them, but, as in *Göschén v. Pearson*, the goods loaded—as presumably these were

before the bills were signed—would be subject to the former contract. His employers had taken the matter of their remuneration out of his hands, and whether intentionally or unintentionally, he would not, towards the persons who contracted with the employer, have power to change what they had done. Even if they had not effected a contract, but thought they had, none the less that part was not committed to him. That all parties thought there was an existing contract is shewn by the references to it in the bills of lading.

The statement of quantities in the bills of lading could, I think, be properly used by the plaintiffs for one purpose. Under our Weights and Measures Act, R.S.C. 1906, ch. 52, sec. 20, a bushel is a measure of capacity, not weight, and contains 80 pounds of distilled water. By sec. 24 every contract made in Canada for carriage of goods is deemed to be in one of the measures referred to in the Act, otherwise to be void, and by sec. 27 the use of local and customary measures is prohibited. Here is a distinct provision that for carriers the bushel is a measure of capacity. It is true that under the Inspection Act, R.S.C. 1906, ch. 85, sec. 90, in contracts for sale and delivery, the bushel of oats is declared to be 34 pounds weight unless the parties stipulate for a bushel of capacity, but that does not apply to carriage. It may be that, although the contract was made in Canada, yet if the goods were to be measured in the United States according to their measures the Act would not apply: *Rosseter v. Cahmann* (1853), 8 Ex. 361; but that would be fatal to this action. Or it may be that, if expressed to be a bushel of 34 pounds, the reference to the pounds would suffice: *Jones v. Giles* (1854), 10 Ex. 119, and S.C. in error, 24 L.J.Ex. 259; *Hughes v. Humphreys* (1854), 3 E. & B. 958. But here there was no such definition in the contract. We may assume, as the parties here have assumed, that the American pound is the same as the Canadian. No evidence is given of the capacity of the American bushel, which I believe is in fact only about one-thirtieth, and not one-seventeenth, less than the capacity of the Canadian (*vide* Standard Dictionary and Encyc. Americana). The admission is that the American bushel of oats weighs 32 pounds. Both at Fort William and at Buffalo the number of bushels was ascertained by weight, and dividing the number of pounds by 34 at the former, and by 32 at the latter place. Now, it appears in

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evidence that oats vary greatly in weight, even so much as from 30 to 48 pounds to the bushel. Manifestly, the 32 and 34 pound standards in the two countries are arbitrary figures, based, perhaps, on the experience of average weight over large areas and in various years in each country, if the latter be not on a commendable Canadian desire to give good measure. These particular oats may have weighed 31, 32 or 35 pounds to the bushel. The plaintiffs have given no direct evidence of their actual bulk. Cubic measure has not been dealt with by either party. The amount paid is well within the possibility of that due for the actual space the oats may have occupied. If Canadian law of capacity and not Fort William or Canadian usage as to weight were to apply, the onus would be on plaintiffs to shew that they have been charged for too much space. For that purpose the bills of lading would afford a fair inference, in the absence of anything to the contrary, that the master was satisfied these did not weigh more than those on which Parliament based the 34-pound standard.

Considering, as I do, that whether there was a contract or not the plaintiffs should fail, the defendants' appeal should, I think, be allowed.

A. H. F. L.

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[IN CHAMBERS.]

THE KING EX REL. BLACK V. CAMPBELL.

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Feb. 18.

*Municipal Elections—Proper Voters' List—Use of Wrong List—Irregularity—Consolidated Municipal Act, 1903—3 Edw. VII. ch. 19 (O.), secs. 148, 204 (O.).*

Inasmuch as sec. 148 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), enacts that the proper list of voters to be used at municipal elections shall be the last list of voters certified by the judge and delivered or transmitted to the clerk of the peace under the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4 (O.), even though a later list has been validly certified by the Judge, but not delivered or transmitted to the clerk of the peace, at all events before the opening of the poll on polling day, it is not the proper list of voters to be used at the election.

*Semble*, that the list to be used must be a list that has been certified by the Judge and delivered or transmitted to the clerk of the peace before the time at which nomination takes place.

*Held*, that the use of a wrong list is not such a non-compliance with the Act as to the taking of the poll or such an irregularity as may be held cured by the provisions of sec. 204 of the Consolidated Municipal Act.

*Quære*, whether a list certified on Sunday can be valid.

THIS was a motion, under secs. 219 *et seq.* of the Consolidated Municipal Act, 3 Edw. VII. ch. 19 (O.), to unseat the mayor and councillors of the city of St. Catharines. The motion was argued in Chambers before ANGLIN, J., on February 17th, 1909.

*W. N. Tilley* and *A. C. Kingstone*, for the relator.

*A. W. Marquis*, for the respondent Campbell.

*C. H. Connor*, for the other respondents.

February 18. ANGLIN, J.:—The relator moves, under secs. 219 *et seq.* of the Consolidated Municipal Act, 3 Edw. VII. ch. 19 (O.), to unseat the mayor and councillors of the city of St. Catharines, returned at the annual elections for the present year.

The ground upon which the motion is based is that the proper list of voters was not used at the election as prescribed by sec. 148 of the statute. The motion was returnable before the Master in Chambers, but, by consent of all parties given by their counsel at bar, it was heard by me in Weekly Court. This course was taken because a motion to continue an injunction granted by the local Judge at St. Catharines, restraining the city council from proceeding with the third reading of a by-law to reduce the number of licenses in that city, was argued before me yesterday, and, as the ground upon which the plaintiff sought to continue his injunction was the alleged illegality of the election of the mayor



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and councillors, it was thought convenient that the proceedings, in which the validity of this election is directly attacked, should be disposed of at the same time as the motion to continue the injunction.

Counsel for the relator stated that their client did not intend to press the application as against the respondent Campbell, the mayor of the city, who was declared elected by acclamation. As to him, therefore, the application will be dismissed with costs.

The material facts and dates upon which must depend the determination of the validity of the election of the municipal councillors appear, from the material, to be as follows:—

The voters' lists were finally revised by His Honour Judge Carman, on the 22nd of December, 1908. The three copies of the revised list were handed to him by the clerk pursuant to sec. 22 of the Voters' Lists Act (7 Edw. VII. ch. 4 (O.)) for certification on the 29th of December, but the clerk did not on that day hand to the Judge the original list revised by him. The Judge required this original list for the purpose of satisfying himself as to the correctness of the three copies. He did not obtain it from the clerk until Saturday, the 2nd of January, 1909, when, according to the clerk's evidence, the Judge said to him: "Now I will have to go over this list with the one you gave me, and I will have to work this afternoon and to-night to have it completed by Sunday." On the Sunday morning the clerk attended the Judge at his house in response to a telephone call. The Judge had been unable to satisfy himself as to six names which appeared upon the three copies of the list handed to him by the clerk, and which he could not find upon the list of appeals. The clerk explained to him that these six names had been placed on the roll by order of the court of revision. The Judge was of opinion that they were wrongly on the list, because their right had not been passed upon by himself in hearing appeals from the court of revision. He, accordingly, on Sunday, the 3rd of January, struck these six names off the copies of the list furnished by the clerk. The clerk says the Judge "did not hand (him) the lists until Sunday. He certified to them some time between Saturday noon and Sunday. . . . They were finished on Sunday, that is the truth of it." The certificate of the Judge attached to the three copies of the list is dated the 2nd January, 1909. The clerk had already prepared and handed

to the deputy returning officers for the several polling sub-divisions, copies of the lists which he had submitted to the Judge for signature on the 29th of December. He gave these copies to the deputy returning officers on the Saturday evening, and at that time he says the lists had not been certified by the Judge. The copies given the deputy returning officers contained the six names which the Judge struck off the list on the Sunday. Otherwise they were correct copies of the lists as finally certified by the Judge. On Saturday evening the clerk struck two names off the copy of the voters' list given to one of the deputy returning officers. On Monday morning before the polls opened he appears to have attended at each of the polling places, except that at Western Hill, and to have struck from the several lists at these respective polling places the names removed by the Judge on the Sunday. The list for the Western Hill polling place contained only one such name, that of Mr. Bowman. The clerk had notified Mr. Bowman not to vote, and had received his promise that he would not vote. He did not correct the list at the Western Hill poll until some time during the day; he says it might have been in the afternoon. The copy of the list which should have been delivered or transmitted to the clerk of the peace, under secs. 21 and 22 of the Voters' Lists Act, was not placed in his hands until 10 o'clock on Monday, the 4th of January, when it was handed to him by his Honour Judge Carman. The nomination for the municipal councillors took place on the 28th of December, 1908, and the polls for the election were open from 9 o'clock in the morning until 5 o'clock in the afternoon of the 4th of January, 1909.

Section 148 of the Consolidated Municipal Act, 1903, reads as follows:—

“Subject to the provisions of the next following three sections, the proper list of voters to be used at an election shall be the first and second parts of the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Voters' Lists Act.”

The relator contends that under this provision, having regard to the facts above stated, the proper list of voters to be used at the municipal election in St. Catharines, held on the 4th of January last, was the list prepared for the year 1908, because that was in fact “the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Voters' Lists Act.”

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The materiality of the issue thus raised is apparent from the fact that in the court of revision held by Judge Carman on the 22nd of December, there were some 200 changes made in the voters' list, and it was stated at bar, without contradiction, that there were 300 names upon the voters' list for 1909 which were not upon the list for 1908.

From the evidence it is reasonably clear that, although the certificate of the Judge attached to the copies of the list bears date the 2nd of January, the copies were not finally approved by the Judge and certified by him until Sunday, the 3rd of January, that they were on that day so certified, and that one certified copy was then handed to the clerk of the municipality pursuant to secs. 21 and 22 of the Voters' Lists Act. If what was done by the Judge on Sunday, the 3rd of January, is to be regarded as purely ministerial, upon the authorities its validity is perhaps not open to question. But if, on that day, he discharged judicial functions in regard to these lists, what he did of that character would be void. It is open to grave question whether the lists, upon which the municipal election in St. Catharines was held, were at any time prior to the close of the polls, or are now, legally certified lists. This point was not raised at bar, and in the view which I have taken of other aspects of this case it is unnecessary to determine it.

Assuming that the list was validly certified by the Judge, was it the proper list of voters to be used at the municipal election? Mr. Tilley argued that the election commences with the nomination, and that the list to be used must be a list that has been certified by the Judge and delivered or transmitted to the clerk of the peace before the time at which nomination takes place. There is a great deal to be said in support of this contention. The electorate should, as pointed out in the *East Durham Case* (1890), 1 Ont. Elect. Cas. 489, at p. 493, know beforehand who the authorized electors are. Mr. Tilley's argument was that between the day of nomination and the day of polling each elector should be able to ascertain, by inquiry at the office of the clerk of the peace, or of the clerk of the municipality, or from the county Judge, each of whom is supposed to have a certified copy of the voters' list in his possession, whether or not his name is upon the list of voters to be used at the election. I incline to think that this contention is sound, and that it is quite probable that the proper list to be used

at the election is the last list of voters which has been certified by the Judge and delivered or transmitted to the clerk of the peace prior to the time of nomination. Section 23 of the statute appears to put it almost beyond doubt that the list to be used must be completed before nomination day, because, even in the case of a person dying after revision, the Judge is permitted to strike his name from the certified list only "before the day of nomination." It would appear from this provision that it was intended that the list to be used at the election should be complete and not subject to alteration after the time of nomination.

The statute in terms enacts that the list to be used shall be "the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace." This language is plain and unequivocal. The conjunction "and" may be contrasted with the conjunction "or" to be found in the third line of sec. 151. I think it incontrovertible that, even though a list has been validly certified by the Judge, if it has not been delivered or transmitted to the clerk of the peace, at all events before the opening of the poll on polling day, it cannot be "the proper list of voters to be used at the election." Section 151, in my opinion, has no bearing upon the matter, because there was a list of voters certified by the Judge and transmitted to the clerk of the peace for the preceding year, and this list was, in my opinion, the last list of voters so certified and delivered, and, therefore, the proper list of voters to be used at the election.

It is true that the use of this list would have disfranchised a considerable number of persons, whose names appear on the list for 1909, without any fault on their part. But that cannot be helped. The Voters' Lists Act apparently does not make it imperative upon the Judge to have the list of voters for the year prepared in time to permit of the municipal election in January being held upon it. The assessment roll was returned on the 7th of October. Section 7 of the Voters' Lists Act, relied upon by Mr. Connor, directs that within thirty days after the return of the roll the clerk shall make out an alphabetical list of voters, shall cause 200 copies of the list to be printed in pamphlet form, and shall post up and deliver the copies as directed by sec. 9; that complaints against the list may be made within thirty days after such posting, and that the list shall be finally revised, corrected

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and certified by the Judge within one month after the day for making complaints. Under these provisions the Judge was not required to finally certify the list for the city of St. Catharines until the 5th day of January, 1909. It is, therefore, manifest that it was not contemplated by the Legislature that the voters' list for 1909 should necessarily be used at the municipal election for that year; hence the provision made by sec. 148 that "the proper list to be used . . . shall be the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace," pointing clearly in this case to the list of the preceding year.

In my opinion, the list used was not the proper list, and the election held upon it cannot be supported.

It was argued that the use of the wrong list is merely a non-compliance with the provisions of the Act as to the taking of the poll, or an irregularity which should be held to be cured by the provisions of sec. 204.\* In my opinion this case does not come within sec. 204. The foundation of a contested election under the Municipal Act is the voters' list. As provided by sec. 165, his right to vote depends upon the elector's name being entered upon the voters' list. If an election is held upon a list which is not a voters' list or is not the proper voters' list to be used, it is not, in my opinion, an election conducted in accordance with the principles laid down in the Act.

But, if sec. 204 did apply, it would be, I think, impossible to say that "it appears" to the Court "that such non-compliance, mistake or irregularity did not affect the result of the election." It was argued that the applicant must shew that the irregularity did affect the result of the election. This would involve treating the statute as if it read, "if it does not appear . . . that such non-compliance, mistake or irregularity did affect the result of the election." Although some of the cases appear to lend colour to this view of the provisions of sec. 204, I can find no justification

\* Section 204. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake, or irregularity did not affect the result of the election.

for so altering its plain language. The burden is upon the applicant to establish the non-compliance, mistake or irregularity; but when that is shewn the burden rests upon the person upholding the election to make "it appear . . . that such non-compliance, mistake or irregularity did not affect the result of the election:" *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, 330-1.

For these reasons, I am of opinion that the election of the municipal councillors of the city of St. Catharines must be set aside, and that an order should issue for the holding of a new election. The respondents, other than the mayor, must pay to the relator his costs of this motion. The order will issue as a Chambers order.

A. H. F. L.

[IN THE COURT OF APPEAL]

FLORENCE MINING CO., LIMITED, v. COBALT LAKE MINING CO.,  
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*Mines and Minerals—Withdrawal of District from Location and Exploration—Orders-in-Council—Property and Civil Rights—British North America Act, 1867—Provincial Act Disposing of Rights sub lite—Intra vires—Constitutional Law—Crown as Party to Action—Notice to Attorney-General of Constitutionality of Act being in Question—Precious Metals—7 Edw. VII. ch. 15 (O.)—Mines Act—R.S.O. 1897, ch. 36 (O.)—6 Edw. VII. ch. 11 (O.).*

June 15.

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April 5.

The plaintiffs claimed to be entitled to a certain mining location situated under part of Cobalt lake, on the ground that their assignor had fulfilled all the requirements of the Mines Act, and had transferred his rights to them. At the time their assignor made his alleged discovery and staked out his claim, neither he, nor any one assisting him, had obtained a miner's license, and Cobalt lake had been by order-in-council withdrawn from location and exploration, as he might have ascertained if he had made inquiry from the proper authority. Moreover, subsequently a sale of the mining locations in question, in spite of the plaintiffs' protests, had been made by the Crown to the defendants in January, 1907, and pending this action, 7 Edw. VII. ch. 15 (O.), had been passed confirming the sale and vesting the fee simple absolute in the lands and in all mines and minerals being and lying in or under the lands, and all mining rights therein and thereto, in the purchasers, the defendants, as and from the date of the sale, free from all claims and demands of every nature whatever in respect of or arising from any discovery location or staking:—

*Held*, that the said Provincial Act was a public Act and *intra vires* as relating to both property and civil rights in the Province, and, although enacted during the pendency of this action, was absolutely conclusive against the claim of the plaintiffs.

The fact that the Attorney-General or his representative may attend the hearing of a case, under notice served upon him that the constitutional validity of an Act of the Legislature is called in question, does not enlarge the jurisdiction of the Court in respect to any substantial relief sought in the action, and if the Crown has not been made a party to such action the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.

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*Semble*, that in a Crown grant of a mining location which was expressed to be subject to the provisions of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), secs. 188 to 221, and which granted both the land and the mining rights as well as the mines and minerals thereon and thereunder, metals and minerals of every description, including the precious or royal metals, passed.

Sections 3, 4 and 5 of the Mines Act, R.S.O. 1897, ch. 36, and secs. 2 (16), 3 (1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals.

THIS was an appeal by the plaintiffs, the Florence Mining Co., Limited, from the judgment of Riddell, J., at the trial of this action, dismissing the action with costs, under the circumstances set out in the judgments.

The action was tried at Toronto on June 8th, 1908, without a jury.

*J. M. Clark*, K.C., *S. H. Bradford*, K.C., and *R. U. MacPherson*, for the plaintiffs.

*E. D. Armour*, K.C., for the Attorney-General of Ontario.

*G. F. Henderson*, K.C., and *Britton Osler*, for the defendants.

June 15. RIDDELL, J.:—In January, 1906, one Green, who had had some experience in mining law and was a solicitor, was contemplating the formation of a syndicate to prospect in the Cobalt district. He communicated with Major Gordon, who was located at the time in Cobalt, and arranged that a diamond drill should be set to work in Cobalt Lake on the ice, under the supervision of Gordon, for Green and his associates, who seem to have formed themselves into a syndicate. Green went to the proper office at the Parliament buildings and procured such information as satisfied him that Cobalt lake was open for prospecting; and I see no reason for doubting the good faith of Green, or of any of those through whom the plaintiffs claim. Neither Green nor Gordon had a miner's license when the drill was started to work; but Gordon, finding indications that a valuable discovery might be made by means of the drill, sent for Green, and on March 7th Green came from Haileybury with licenses for himself and Gordon; and thereupon and thereafter the drill was drawn and found to have pierced a valuable silver vein. A survey was at once had, and staking after a fashion made. I do not set out the particulars, as these are fully shewn in the evidence of Gordon. Gordon's evidence should be given full credence throughout; and

if it be necessary to consider the staking, the facts will not be in dispute. In the view I take of the law in the case, all this is immaterial.

An application was made for filing and recording the claim, but the inspector (recorder) refused to record it, as the lake had been, he said, withdrawn and was not open for prospecting. Every effort was made by the discoverers and their assignees, the plaintiffs, to procure the land claimed (which was the land under the major part of Cobalt lake), but without avail.

Cobalt lake is in the township of Coleman, which was in the Temiskaming mining division (established by Order-in-Council April 15th, 1905). On August 28th, 1905, such parts of the township of Coleman (with other lands) as had not theretofore been disposed of, were, under sec. 33 of R.S.O. 1897, ch. 36, withdrawn from sale or lease; but an Order-in-Council, approved October 30th, 1905, authorized the inspector (recorder) of the mining division to record mining claims situated in the said township (and elsewhere) under the amended regulations for mining divisions, upon certain conditions. This Order-in-Council detached the township of Coleman from the Temiskaming mining division, and made it a separate mining division under the name and title of the Coleman mining division, with the same inspector (recorder) and head office as the Temiskaming mining division.

It is plain that the inspector considered that Cobalt lake was not open for prospecting, and that the same opinion was shared by the officers of the department, including the Minister. Upon the department being applied to by Green, his solicitors were informed that his application could not be considered.

At the trial I refused to compel the Minister to state the grounds of the position taken by him and his department. I considered that the Court has, on a record like this, no concern with the reasons actuating a Minister of the Crown in a matter of public policy.

All legitimate means were employed by the plaintiffs to have what they claimed as their rights granted to them; but their efforts were ineffective. The plaintiffs are the assignees of Green.

Against the protest of the plaintiffs the Crown sold in fee simple the bed of the lake, including all mineral rights, etc., etc., for a very large sum to the defendants, without any discovery made by or for them, and a grant was made accordingly, January, 1907.

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The defendants, of course, had full notice and knowledge of the claim of the plaintiff.

I refused at the trial to compel the Minister to say why this sale was made as it was, or why the plaintiffs did not receive a patent. In my view, the advisers of His Majesty are not responsible to the Court for their official acts or advice. They are responsible to the Legislature and to the representative of His Majesty, and in the last resort to the people; but the Court has no right on such a record as this to ask or to consider the motives actuating any Minister of the Crown.

In 1906 an Act was passed, 6 Edw.VII. ch. 12(O.), confirming the Order-in-Council of the 14th of August, and declaring it "to have been and now to be binding and effectual for the purposes therein mentioned." And after the grant to the defendants another Act was passed, 7 Edw. VII. ch. 15 (O.), which, after reciting the sale (*inter alia*) of Cobalt lake "and the lands covered by the same, together with all mineral rights thereon and thereunder," and the desirability of confirming the title of the purchasers, expressly enacted that the sale of Cobalt lake "and the lands covered by waters of the same, with the mineral rights and the patents therefor, are hereby confirmed, and the fee absolute in the said lands, and in all the mines and minerals being and lying in or under the said lands, and all mining rights therein and thereto, are declared to be vested in the said purchasers respectively, as and from the date of the said sales, absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location, or staking." The second section provides that "all discoveries and claims, if any, made or arising prior to such sales, shall be dealt with by the Lieutenant-Governor-in-Council as he may think fit."

This action was begun December 26th, 1906. It claims that the patent to the defendants issued erroneously and should be set aside, that the rights of the defendants are subject to the rights of the plaintiffs; and asks for consequential relief. The defendants say that Cobalt lake was not open for discovery; that Green did not observe the provisions of the Mines Act, and that the patent to the defendants is valid. They also plead that the Attorney-General is a necessary party, and that they are purchasers for value.

It is a matter of public notoriety that the plaintiffs endeavoured to have the Act of 1907 disallowed by the Dominion authorities and failed.

It is also not denied that the Acts of 1906 and 1907 were "Government measures," and were intended to bar the claim of the plaintiffs.

A very careful and able argument was submitted by counsel for the plaintiffs, but I am unable to find any grounds upon which they are entitled to recover.

The many difficult questions arising in respect of the interpretation of the R.S.O. 1897, ch. 36, the right of the discoverers to prospect at all, and the effect of what they did, the possibility of such an action as this being sustained in the absence of the Attorney-General, etc., I do not pass upon.

This is a matter of property and civil rights; by the British North America Act this is wholly within the jurisdiction of the Legislature of the Province; in matters within their jurisdiction, the Legislature have the same powers as Parliament, and "the power . . . of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws concerning matters of all possible denominations:" Blackstone's Commentaries, Book 1, p. 160. Within the jurisdiction given the Legislature of the Province no power can interfere with the Legislature, except, of course, the Dominion authorities, whose interference may occasion disallowance. There is no need here to speak of the paramount power of the Imperial Parliament.

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, "Thou shalt not steal," has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States.

I cannot read sec. 1 of the Act of 1907 as meaning anything

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less than that the plaintiffs are not to have any rights in the property; and this is made more clear, if possible, by sec. 2, which provides that all such claims as this shall be dealt with by the Lieutenant-Governor-in-Council as he may think fit.

It seems to me the only recourse for the plaintiffs is to appeal for consideration to the Lieutenant-Governor-in-Council; with the manner in which such an appeal should be dealt with, the Court has nothing to do.

The action must be dismissed with costs, limited to the costs incurred from and after the 20th of April, 1907, the day of the date of the Act of Edw. VII. coming into force.

The appeal was argued on February 5th, 1909, before Moss, C.J.O., and GARROW and MACLAREN, JJ.A.

*J. M. Clark, K.C., S. H. Bradford, K.C., and R. U. MacPherson*, for the plaintiffs, appellants, contended that apart from the two *ex post facto* statutes the property in question clearly belonged to the appellants under the findings of the trial Judge who heard the evidence, inasmuch as he held that information handed discoverer by Ontario Government officials "satisfied him that Cobalt lake was open for prospecting," and that there was a discovery by licensee followed by use of "all legitimate means" to protect discovery; that Cobalt lake was found to be in the township of Coleman, which was thrown open for exploration by Order-in-Council of October 30th, 1905, and in the information handed out there was no reference directly or indirectly to the Order-in-Council of August 14th, 1905, or any suggestion that Cobalt lake was withdrawn; that this Order-in-Council was at the time unwarranted and void, and though validated by the subsequent statute of 1906, 6 Edw. VII. ch. 12 (O.), this statute will be construed so as not to affect the interests of the appellant which had meantime become vested: Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (58); that the patent to the respondent was unauthorized and void: *Reynolds v. Attorney-General*, [1896] A.C. 240; that even if held valid it does not cover the precious metals: *Ontario Mining Co. v. Seybold* (1899), 31 O.R. 386; *Attorney-General v. Mercer* (1883), 8 App. Cas. 767; *Esquimalt and Nanaimo R.W. Co.*, [1896] A.C. 561; *Woolley v. Attorney-General of Victoria* (1877), 2 App. Cas. 163; *Attorney-General of British Columbia v. Attorney-General of Canada*

(1889), 14 App. Cas. 295; that the title of the appellants, being based on a discovery of silver under the Mines Act, included the precious metals; that the Act of 1906, 6 Edw. VII. ch. 12 (O.), would be given effect to by holding the Order-in-Council of August 14th, 1905, in force until Cobalt lake was thrown open for exploration by the Order-in-Council of October 30th, 1905; that this was strengthened by the reference in the statute to discoveries before August 14th, 1905, indicating that it was not intended to affect the appellant's discovery of March 7th, 1906; that the Act of 1907, 7 Edw. VII. ch. 15 (O.), was "in the nature of a private Act." *Brett v. Beale* (1829), 1 Moo. & M. 416, at p. 425, cited in *Corporation of City of Quebec v. Quebec Central R.W. Co.* (1884), 10 S.C.R. 563, Ritchie, C.J., at p. 582; *Dewson v. Pavor* (1844), 5 Ha. 415; *Re Goodhue* (1872), 19 Gr. 366; *Corporation of City of Quebec v. Quebec R.W. Co.* (1884), 10 S.C.R. 563, at p. 582; that 7 Edw. VII. ch. 15 (O.), was *ultra vires* and void, being inconsistent with the constitutional safeguards of private rights; that the British North America Act, 1867, made a division or distribution of powers into three divisions of executive, legislative and judicial: *Hamilton and North-Western R.W. Co.* (1876), 39 U.C.R. 93, *per* Harrison, C.J., at 112; that confiscation is beyond the power of a Provincial Legislature: *Dobie v. Temporalities Board* (1881), 7 App. Cas. 136, at p. 151; *Attorney-General for the Dominion v. Attorney-General for the Provinces*, [1898] A.C. 713; and that the right to have the appellants' case decided by the Courts cannot be taken away by this legislation: *In re Will of Wi Matua*, [1908] A.C. 448.

*E. D. Armour*, K.C., and *G. F. Henderson*, K.C., for the respondents (*Armour* also appearing for the Attorney-General of Ontario), contended that plaintiff had not and never had had any title; that no application had ever been made to the department to know whether Cobalt lake was open for exploration or not; that the first qualification for making a discovery was wanting in the holding of a license; that there had been no valuable discovery within the meaning of the Mines Act; that even if the claim had been accepted by the recorder and recorded in his office—which it was not—it could not be allowed; that the regulations as to staking in the lake could not be properly carried out; that what staking there was was not what the Act required; that Green and his

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associates deliberately set out to take advantage of what they erroneously conceived to be a technical weakness in the departmental legislation; that the claim in this case not being recorded could not be assigned; that there was no evidence that the defendants had no notice of the plaintiffs' claim; that the Order-in-Council of August 14th, 1905, had been duly confirmed by the Act, 6 Edw. VII. ch. 12 (O.), and made a good and valid one as from the beginning; that the parts specially withdrawn by that Order-in-Council still remained withdrawn; that the point as to the patent not covering the gold and precious metals had not been raised on the pleadings, and was not before the trial Judge; that if the plaintiffs were allowed to amend, the defendants should also be allowed to amend by shewing what was intended to be granted and to have the patent amended; that as to the Act, 7 Edw. VII. ch. 15 (O.), it was not unreasonable for the Legislature to confirm the action of the department; that it was an Act to quiet title, and all the claimants were left to be dealt with by the Crown. They cited *VanDieman's Land Co. v. Marine Board of Table Cape*, [1906] A.C. 92; *Attorney-General for Canada v. Attorney-Generals for the Provinces*, [1898] A.C. 700; *McGregor v. Esquimalt and Nanaimo R.W. Co.*, [1907] A.C. 462.

April 5. The judgment of the Court was delivered by Moss, C.J.O.:—The first matter for consideration on this appeal is the constitution and frame of the action and the nature and extent of the relief which, assuming them to be entitled to any, the plaintiffs can be awarded on the present record.

By letters patent under the Great Seal of the Province, dated the 15th of January, 1907, the Crown, in consideration of the payment of \$1,085,000, granted to the defendants in fee a parcel of land covered with water situate in the township of Coleman, containing 55 acres, more or less, described as being composed of Cobalt lake mining location, being land covered with the water of part of Cobalt lake, together with the mines, minerals and mining rights thereon and thereunder, and being all that part of the land covered with the water of Cobalt lake lying southerly, easterly and south-westerly of the south-easterly limit of the right-of-way and Cobalt station grounds of the Temiskaming and Northern Ontario Railway, excepting that portion of land covered with

water of the lake designated as mining location J. S. 55, containing 4 acres, more or less, granted by letters patent dated July 31st, 1905, to certain named persons.

The plaintiffs, claiming as the assignees of one W. J. Green, allege that on the 7th of March, 1906, the said Green, while engaged in explorations under the waters of the lake, made a discovery of valuable ore or mineral in place under part of the lake, and thereupon staked out a mining claim in accordance with the Mining Act, embracing 20 acres or thereabouts of the lands covered with the waters of the lake, thereby becoming, as they allege, entitled to the said mining claim and the minerals thereunder, and afterwards and within due time sought to procure the due filing of the claim in the office of the recorder of mining claims in the proper mining district, but he was unsuccessful owing to the refusal of the recorder to receive and record his claim and the refusal of the Bureau of Mines or the Minister of the department to entertain or consider his claim; that, notwithstanding the existence of the said claim, the Crown assumed to sell and grant to the defendants the lands described in the letters patent, including therein the portion embraced in the said mining claim; that such sale was without any legislative authority, and the letters patent were issued erroneously and by mistake and improvidently, and that notwithstanding the said sale and issue of letters patent, the plaintiffs are entitled to the parcel of land described in the claim of the said W. J. Green. The plaintiffs claim (1) a declaration that the letters patent were issued erroneously by mistake and improvidently, and are utterly void as against the plaintiffs, and that the plaintiffs are entitled to the lands and minerals; (2) a declaration that the defendants' rights, if any, under the letters patent, are subject to the plaintiffs' said rights; (3) an injunction restraining the defendants, their servants, workmen or agents, from extracting or removing ore or minerals from the claim or interfering with the plaintiffs' exclusive right of possession; (4) an account of all ore or minerals that may be extracted or removed from the claim; (5) a judgment setting aside as *ultra vires* and void the letters patent in favour of the defendants as against the plaintiffs, or in the alternative confining the operation thereof to the lands therein described other than those claimed by the plaintiffs; (6) costs; (7) further and other relief.

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The Crown is not a party to the action. True, the Attorney-General was represented at the trial and on the argument of the appeal, but that was by reason of a notice under the Judicature Act (sec. 60), because of the plaintiffs having called into question the constitutional validity of certain Acts of the Legislature, to which further reference will be made.

The presence of the Attorney-General or his representative under this provision does not, of course, enlarge the jurisdiction of the Court in respect of any substantial relief sought in the action. In that respect the action must still be regarded as one to which the Crown is not a party. It is obvious, therefore, that the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.

A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: *Martyn v. Kennedy* (1853), 4 Gr. 61; *Stevens v. Cook* (1864), 10 Gr. 410. See also *Farah v. Glen Lake Mining Co.* (1908), 17 O.L.R. 1.

But in such cases the relief is limited to declaring the patent void, leaving the parties to stand to one another as if the patent had never issued, their final rights in respect of the land being left to be determined and settled by the Crown, to which the lands are restored by the avoidance of the patent.

The Court is not called upon, and in the absence of the Crown as a party to the record cannot be called upon, to exercise the jurisdiction which is vested in it by sec. 26 (7) of the Judicature Act, R.S.O. 1897, ch. 51, to decree the issue of letters patent from the Crown to rightful claimants. It is not necessary to enter upon a discussion as to the powers possessed by the Court under this provision, or to consider whether it applies to letters patent granting Crown lands, for in this case the record is not so framed or constituted as to parties as to enable such relief to be granted. Nor, in the absence of the Crown, can the Court undertake to make any declaration as to the ultimate title or right of the plaintiffs, for the reason that no such declaration could have any binding effect upon the Crown's

rights in the premises. The utmost to which the Court should go in this direction is to inquire into the plaintiffs' claim to the extent necessary to ascertain whether they have a reasonable ground for invoking the jurisdiction of the Court to declare the patent void in whole or in part as having issued through error or improvidence: *Farmer v. Livingstone* (1883), 8 S.C.R. 140. Fraud is not alleged or proved in this case.

The Court being satisfied that the plaintiffs have shewn an interest in the land existing before and at the time of the issue of the letters patent (*Mutchmore v. Davis* (1868), 14 Gr. 346, in the Court of Error and Appeal), which *primâ facie* appears to entitle him to obtain a grant thereof from the Crown, and that the defendants' patent issued either through error or improvidence, may sweep it out of the way and restore the *status quo*.

But it cannot be expected that on this record the Court will go further and adjudge as to the respective titles of the Crown, the plaintiffs or the defendants.

The next question, then, is, has it been made to appear that at the date of the issue of the letters patent to the defendants the plaintiffs were possessed of or entitled to such an interest in the portion of the patented lands claimed by them as entitles them to ask the interposition of the Court in their favour? The learned trial Judge did not pass upon this question. The defendants dispute the plaintiffs' status, and present a number of objections, some of which are formidable, if not insurmountable. They point out that the plaintiffs' interest, if any, is that claimed by their assignor, W. J. Green, as a prospector and explorer holding a miner's license by virtue of an alleged discovery of valuable ore or mineral in place under the waters of Cobalt lake, and they say that at the time of the alleged discovery neither Green nor anyone working for him held a miner's license, and that Cobalt lake was withdrawn by the Lieutenant-Governor-in-Council from sale, location or exploration, under the provisions of the Mines Act, and that Green and those associated with him were aware of that fact or could have ascertained the fact if they had made proper inquiry, but they deliberately refrained from doing so; that whatever may have been done in the way of exploration or discovery was done without the authority of a miner's license and was conducted in direct contravention of the prohibition of the Mines Act against

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exploration on lands of the Crown withdrawn from sale, location or exploration, and any supposed discovery made under such circumstances conferred no right to a mining claim under the Act. The defendants say further that no discovery of valuable ore or mineral in place was actually made, and that the provisions of the Mines Act and the regulations made thereunder with regard to discovery, staking, proof of claim and inspection, were not complied with, and the claim was never presented, recorded or inspected in such manner as to entitle Green to assert under the Act any title to a mining claim situate under the waters of Cobalt lake, or to confer on him any right thereto. The defendants further say, that upon presentation of the claim for record in the office of the mining recorder, it was rightly rejected by the recorder, because it purported to be a claim of discovery in Cobalt lake which was not open for exploration, and because he was under instruction not to receive claims in respect of it, that his action was confirmed by the officers of the Bureau of Mines, and that the Minister of Lands, Forests and Mines rejected the claim for the same reasons.

Now, in order to obtain the recognition by the Crown of a right in respect of a mining claim, it was incumbent on the claimant to place himself in the position of one who had fully or substantially fulfilled all the requirements of the Mines Act and the regulations thereunder.

The primary requisites at the date of the alleged discovery were the possession of a miner's license and discovery made on Crown lands not withdrawn from location or exploration: Mines Act, R.S.O. 1897, ch. 36, sec. 9, and secs. 45, 46 and 47, as amended by the Act, 61 Vict. ch. 11, secs. 1 and 2 (O.). Section 9 reads that "any person" may explore for minerals on any Crown lands . . . except such as may have been withdrawn from sale, location or exploration, but a reference to the other sections shews that the person spoken of is a person holding a license. See also the regulations approved by Order-in-Council of April 5th, 1905, clauses 1, 12, 13, 15 and 16.

It is plain that the explorations leading to the alleged discovery were all made before Green or anyone assisting him in the work had procured a miner's license, and it was not until they believed themselves to be on the eve of a discovery of valuable mineral that the withdrawal of a core from the diamond drill was suspended

until a miner's license was hurriedly obtained. Then when the withdrawal was actually made no inspector was present to verify the core as one *bonâ fide* taken from the place, though probably the omission to have an inspector there might have been remedied later on by the withdrawal of another core in the presence of an inspector. But assuming the regularity of these proceedings, they could be of no avail to create rights if the land was withdrawn from location or exploration: sec. 47. Whether it was or not depends on the true construction of three Orders-in-Council of the 14th and 21st of August and the 30th of October, 1905, as reflected in the light of an Act of the Legislature, 6 Edw. VII. ch. 12 (O).

Section 33 of the Mines Act (R.S.O. 1897, ch. 36) provided that where a part or section of the Province was shewn or reported to be rich in mines or minerals, the Lieutenant-Governor-in-Council might withdraw the whole or a portion thereof from sale or lease and set the same apart pending an exploration thereof or the prospecting of veins, lodes or other deposits of ores or minerals therein by the use of a diamond drill or otherwise, under the direction of the Commissioner of Crown Lands (now the Minister of Lands, Forests and Mines), and might fix the price or offer the same for sale by public auction.

The Order-in-Council of the 14th of August, 1905, directed that—together with other specified property of the Crown—"the lakes known as Cobalt and Kerr lakes, situated in the township of Coleman, be withdrawn from exploration for mines and minerals, and from sale, lease or location." This treatment of Cobalt lake, as well as previous dealings in regard to portions of it, seems to import the view that the provisions of the Act and of the regulations with regard to discovery, staking, proof of claim, recording, etc., were thought to be applicable to lands covered by a large body of water, and not confined to surface lands. Unquestionably such provisions as those relating to the planting and maintenance of discovery and marking posts cannot be satisfactorily complied with so as to ensure permanence where deep water covers the land upon which the discovery is said to have been made. Where, as in this instance, the posts were merely planted in the ice, all traces of the point of discovery and of the supposed boundaries of the claim are obliterated with the breaking up of the ice.

The Order-in-Council, however, left no doubt as to the intention

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of the Crown with regard to the lakes mentioned, *viz.*, that they were not to be subject to exploration for mines or minerals. By means of it, at all events, they were made prohibited territory for explorers and prospectors, and were also removed from the list of lands open for location, lease or sale. While that prohibition existed it was not open to any person to make a discovery upon which he could validly maintain a claim under secs. 26 to 33, having regard to secs. 9, 33, 46, 47 and 48 of the Mines Act. And this quite apart from the difficulties, some of which have already been alluded to, surrounding the marking of the place of discovery, the placing of permanent posts shewing the boundaries of the claim, and the proof thereof for purposes of recording.

The Order-in-Council of the 28th of August, 1905, after setting forth that the townships of Coleman and Burke, Lorrain and Hudson, in the district of Nipissing, were shewn to be rich in ores and minerals. directed that such parts of the said townships as had not already been leased or sold be "withdrawn from sale and lease" under the Mines Act, and be set apart under sec. 33—not interfering with the rights of anyone who had theretofore made applications for mining lands in the said townships. No specific mention is made of Cobalt and Kerr lakes, which had been specially dealt with by the Order-in-Council of the 14th of August.

There is nothing in the Order-in-Council of August 28th to indicate an intention to supersede the prior order as regards the withdrawal of these lakes from "exploration for mines and minerals." To that extent, at all events, the first order was left to its operation on these lakes, and while the unsold and unleased parts of the township were placed under sec. 33, the lakes still remained withdrawn from exploration, and so under the prohibition contained in secs. 9 and 47.

The Order-in-Council of the 30th of October, 1905, dealt only with the effect of the Order-in-Council of the 28th of August. Its purpose was to enable licensed miners to do what was requisite in order to acquire a mining claim upon any of the open lands in the township, and to record it, subject to the specified conditions and restrictions. But it did not authorize, or assume to authorize, the receiving or recording of a mining claim in respect of a part of the township which was withdrawn from exploration and was therefore still under the prohibition of secs. 9 and 47. The testi-

mony of Mr. G. T. Smith, the mining inspector and recorder for the district, supports the view that this was the intention. He shews that he received his instructions from the Department or Bureau of Mines that the lakes were withdrawn from exploration, accompanied by a copy of the Order-in-Council, on or about the 18th of August, 1905, and those instructions were never afterwards countermanded; that no claim was thereafter presented to him for record until the 8th of March, 1906, when Green's was presented, and he declined to receive or record it because Cobalt lake was withdrawn from exploration. As to this the learned trial Judge says: "It is plain that the inspector considered that Cobalt lake was not open for prospecting and that the same opinion was shared by the officers of the department, including the Minister," and this appears to be a fair and proper inference from the facts and circumstances in evidence.

Strengthening this view is the Act of the Legislature, 6 Edw. VII. ch. 12 (O.) by sec. 1 of which it is enacted that the Order-in-Council of the 14th of August, 1905, is confirmed and declared to have been and now to be binding and effectual for the purposes therein mentioned. This Act received the assent of the Lieutenant-Governor on the 14th of May, 1906, rather more than two months after the refusal to record the claim on which the plaintiffs rely, and it is argued that effect should not be given to it to their prejudice. In view, however, of the actual situation before and at the time when Green and those associated with him assumed to make explorations on Cobalt lake, their course of conduct is difficult to understand. Assuming that it was the intention that Cobalt lake should continue and remain withdrawn from exploration, an inquiry from the Department or the Bureau of Mines, or from the inspector and recorder of the district whether that was the case would have elicited an affirmative answer. But, according to Green's testimony, he appears to have deliberately refrained from addressing the question to anyone. He is described in the statement of claim as a broker, but from his testimony it appears that for some time he practised law and had acquired a good deal of experience in mining law. In January, 1906, he consulted a legal gentleman practising law in Toronto about forming a syndicate to prospect at Cobalt. He was introduced to a Major Gordon, and there was a discussion about the chances of finding mineral on Cobalt lake, and Gordon

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said he was certain he could find a vein of mineral in the lake. Green then went to the Bureau of Mines and inquired for information relating to the Cobalt district. He saw one of the clerks, a young woman, and was given several pamphlets, one or two mining reports, and the rules and regulations. He told the clerk that he wanted all the information they could give him relating to the Cobalt district. She handed him the pamphlets and told him that everything was contained there except a map of what claims or sections were open for location, but that he would find the map probably at the recorder's office at Haileybury. He then went to Haileybury to the mining recorder's office and saw a young woman clerk in charge of the office. He asked for a map shewing what claims were open for location, and was handed a map of claims shewing sections marked. On the map appeared sections marked with a capital "A." The clerk told him the sections so marked indicated the sections applied for. From the rules and regulations and the map, he says, he came to the conclusion that Cobalt lake was open for exploration. He and Major Gordon then set up a diamond drill on Cobalt lake and worked there for some weeks. Neither of them had a miner's license. On cross-examination he said that when he went to the Bureau of Mines he didn't see the Minister or his Deputy. He did not think it was necessary to see anybody who was appointed to give out information. He did not make any inquiry at that time as to whether or not Cobalt lake was open. He made no special inquiry about Cobalt lake: simply asked for the literature and all information. He made no inquiry about Orders-in-Council. He made no special inquiries at Haileybury about Cobalt lake. He asked the clerk at Haileybury if the map was up to date, and she replied, "Yes." She said it was made up every two or three days. He merely asked her the question, "Is this up to date?" and she said, "Yes." He did not direct her attention to Cobalt lake, nor mention any special place where he was going to prospect. Then, without more the diamond drill was placed on the ice and operations were begun in Cobalt lake. Now, if Green was misled he had only himself to blame. A plain, direct question either at the Bureau of Mines or Haileybury would have undoubtedly elicited the information that Cobalt lake was not open for prospecting. But evidently, to suit his own purposes, he did not desire to put the direct question.

There was nothing misleading in the information he did obtain. The regulations were, of course, applicable to all mining districts. The first clause directs attention to the fact that no exploring is to be done on lands withdrawn from sale, location or "exploration." And clause 16 repeats verbatim the proviso of sec. 47 of the Act against marking or staking a mining claim on Crown lands withdrawn from location or exploration. The map furnished him shewed a condition entirely consistent with the intention and practical working of the Orders-in-Council of the 14th of August and the 30th of October. The sections or lots actually applied for out of the parts of the township in respect of which the Order-in-Council of the 30th of October authorized the recorder to record claims were marked on the office map from day to day as they came in, and it is not suggested that the map was inaccurate. A frank question would have led to a full explanation, but for some mysterious reason it was not asked.

In these circumstances the plaintiffs have nothing to blame the department or Bureau of Mines for. They present no valid ground or reason for saying that effect should not be given to the intention of the Crown with regard to Cobalt lake. It follows that what was assumed to be done by Green and his associates by way of exploration and alleged discovery, marking and staking, did not create a right to a mining claim under the Mines Act. That being so, it is hardly necessary to say that what is shewn to have been afterwards done or attempted to be done by them in the way of insisting upon recognition of the claim is immaterial and need not be considered. The Crown never receded from the position which was taken on its behalf the moment Green's claim was presented, that Cobalt lake being withdrawn there was no claim to be considered. And afterwards, acting under the authority of sec. 33 of the Mines Act, a sale was made to the defendants. The result is that the plaintiffs have no status to impeach the sale or the letters patent issued in pursuance thereof.

On these grounds the judgment appealed from should be upheld. But if these grounds should not prevail there still remain the questions as to the defendants' position as purchasers for value, and as to the effect of the Act of the Legislature, 7 Edw. VII. ch. 15 (O).

That the defendants became the purchasers in good faith and

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for value the evidence leaves in no doubt. Apparently they had no notice of the plaintiffs' claim until after the acceptance of their tender and payment of the deposit, but before the payment of the balance of the purchase money and the issue of the letters patent they were aware that the plaintiffs were claiming the portion of Cobalt lake in respect of which this action is brought.

And assuming that the plaintiffs were able to establish a status entitling them to impeach the sale, the defendants would derive no protection from the plea of purchasers for value without notice.

But they would still be entitled to the benefit of the Act, 7 Edw. VII. ch. 15 (O).

Many objections have been urged with much force and ability against the constitutional validity and the legal effect of this Act.

It is impossible, however, to conclude that it is a private and not a general Act, and that it was not intended to validate and confirm the sale and grant of the lands comprised in the letters patent and of all the mines and minerals being and lying in and under the lands and all mining rights therein and thereto, and to vest the property therein and thereto in the defendants as and from the date of the sale, absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location or staking. Having regard to what is known to have transpired before and up to the time of the passing of the Act, it is not possible to ignore the significance of the enactment, or to seek to treat it as inapplicable to the plaintiffs' asserted claim to impeach the grant to the defendants.

And unless the enactment was beyond the legislative authority of the Legislature, it must be taken as absolutely concluding any claim to the lands to which the plaintiffs assert title in this action.

It was urged that the legislation was *ultra vires* and incompetent because it was enacted during the pendency of this action, and its effect, if valid, is to usurp the functions of the Courts and to declare the rights of individuals in property in derogation of the ordinary law of the Province.

But the subject matter of the enactment falls clearly within the category of property and civil rights. The right claimed by the plaintiffs is, if anything, a right in property within the Province. So the right to bring an action is a civil right. And both have, by sec. 92 of the British North America Act, been made subject

to the legislative authority of the Provincial Legislature. And where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight. As said by Lord Herschell, in *The Attorney-General of Canada v. The Attorney-General of the Provinces*, [1898] A.C. 700, when discussing the question of the relative legislative powers and authority of the Parliament of Canada and the Legislatures of the Provinces under the British North America Act (p. 713): "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used, if it is, the only remedy is an appeal to those by whom the Legislature is elected."

Lord Herschell added: "If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by sec. 91."

But this latter remark was made in relation to the respective powers and property rights of the Dominion and the Provinces, and has no application to a case like the present, where the lands were Crown lands, the property of the Province.

Even supposing the opinion of a Court to be that the letters patent issued in error and improvidently, the Act must still remain as a legislative declaration of the validity of the sale. And in that respect the Act would form a bar to the plaintiffs' alleged rights.

Another point, not, however, raised by the pleadings or argued in the Court below, was suggested upon the argument of the appeal. It was contended that the grant to the defendants did not comprise or carry with it a grant of the precious or "royal" metals. The grant is of the land covered with water, composed of Cobalt lake mining location, together with the mines, minerals and mining rights thereon and thereunder.

The Mines Act, R.S.O. 1897, ch. 36, sec. 2 (6) (O.), defines mining rights as meaning the ores, mines and minerals on or under any land where the same are dealt with separately from the surface of the land: see also the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), sec. 2 (9) (10) and (12). Here the letters

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patent are issued subject to the provisions of secs. 188 to 221 inclusive of the Mines Act, 1906, and there is a grant both of the land and of the mining rights, as well as of the mines and minerals thereon and thereunder; words which, having regard to the nature of the territory and the purposes of the grant, seem broad and comprehensive enough, one might suppose, to justify a construction that would include metals and minerals of every description. Sections 3, 4 and 5 of the Mines Act, R.S.O. 1897, ch. 36, and secs. 2 (16) and 3 (1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals. But if this be not so, the plaintiffs' case is not thereby advanced, for their claim, if any, is under the Mines Act, R.S.O. 1897, ch. 36, and any grant to them would not be more extensive in terms or effect than the grant made to the defendants. However, the point is not properly open to the plaintiffs on this appeal.

There may be a question whether the plaintiffs are entitled to maintain this action as assignees of Green. Section 47 of the Mines Act, R.S.O. 1897, ch. 36, enables a licensee who has discovered a vein or other deposit of ore or mineral to mark or stake out a mining claim, providing that it is on Crown lands, not withdrawn from location or exploration, and "to transfer his interest therein to another licensee."

This appears to be the only provision in force when the transfer was made to the plaintiffs enabling a discoverer to transfer his interest to another. He does not appear to be authorized to make a transfer of a mining claim arising in respect of Crown lands withdrawn from exploration. The question whether, assuming that Green did acquire mining rights in or under Cobalt lake, notwithstanding that it was withdrawn from exploration, he could make a valid transfer of such rights so as to enable his transferee to maintain an action in respect of them, was not raised or discussed, and it is not necessary to the disposal of the appeal that it should be considered.

The appeal must be dismissed.

A. H. F. L.

## [DIVISIONAL COURT].

## ERB V. DRESDEN PUBLIC SCHOOL BOARD.

*Public School Trustees—Powers of—Building School House—Employing Architect to Prepare Plans—Rejection of By-law Authorizing Necessary Expenditure—Action of Architect for Fees—Quantum Meruit.*

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It is within the power of trustees of public schools to employ an architect for hire to prepare plans, etc., for a proposed school house, and an architect who has prepared such plans is entitled to be remunerated on a *quantum meruit*, even though a by-law authorizing the necessary expenditure for the building is rejected by the municipal council or the electors; BOYD, C. dissented on the ground that the plaintiff was not entitled to be paid upon the special circumstances.

Judgment of MacMahon, J., at the trial, reversed.

THIS was an appeal by the plaintiff from the judgment of MACMAHON, J., in this action, which was tried before him, at Sarnia, on September 22nd and 23rd, 1908.

A. Weir, for the plaintiff.

J. W. Sharpe, K.C., for the defendants.

October 27. MACMAHON, J.:—The action is brought by the plaintiff, an architect of Port Huron, to recover \$700, being two and one-half per cent. on \$28,000, the estimated cost of a public school building to be erected in the town of Dresden, for which he had prepared plans and specifications alleged to have been ordered and accepted by the defendants.

The council of the town of Dresden had in January, 1906, submitted a by-law (No. 321) to the qualified electors for raising \$18,000 by the issue of debentures for the erection of a public school building, which was defeated by 127 votes.

On April 23rd, 1906, at a meeting of the defendants' board, a resolution was carried, "that we build a ten-room school-house." And on May 4th, 1906, a resolution was passed, "that we advertise for a pencil sketch and estimate of the cost of a ten-room school-house; Mr. Miller (the secretary *pro tem.*) to write out the advertisement to be published in the *Mail and Empire* and the *Toronto Globe*."

The plaintiff, on August 27th, 1906, sent a sketch of the proposed school building, together with a lengthened description thereof; also an estimate of the cost.

On November 20th, 1906, a special meeting of the board was held, at which plans (sketches) for the school building were pre-

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sented and explained by the architects furnishing the sketches—Mr. Piper, Mr. Wilson and Mr. Erb. And it was moved by Mr. Laird and seconded by Dr. Thornton, “that we advertise for competitive plans for architects, who shall be required to submit a guaranteed estimate of cost. The committee to advertise and to prepare information to consist of Messrs. Laird, Thornton and Miller.”

The board advertised for competitive plans to be in by December 28th, 1906, and the committee formulated instructions and rules, which were sent to architects desiring to compete, “which each architect must carefully observe.”

One of the rules was: “Each drawing is to be distinguished by a motto or cypher, and no handwriting of any sort is to be upon the drawings. A sealed envelope, bearing the same motto or cypher, and containing the architect’s certificate of cost, together with the name and address of the author, is to be sent to G. A. Miller, secretary.”

The successful competitor was to be the architect of the building at a compensation to be agreed upon.

On December 26th the plaintiff wrote J. H. Laird, one of the trustees, the chairman of the board, and a member of the committee formulating the instructions and rules, saying, “My plan will be amongst the bunch, and hope you will receive a lot of them, so that your selection may be made after a careful examination for the several plans received. . . . I am submitting practically the same plan as already shewn you, and, of course, you will recognize it.”

On December 28th a meeting of the board was held, at which all the members were present, and seventeen plans from architects were presented for examination. A final examination of the plans was made at a meeting of the board held on January 7th, 1907, when it was moved by Mr. Laird and seconded by Mr. Burnett, that the plan bearing a motto (which turned out to be the plaintiff’s) be accepted.

The plaintiff, in sending the letter to the secretary of the board containing his cypher, stated, “If my plans are adopted, I will be pleased to make any minor changes to meet the desire of your board.”

A resolution was passed by the school board requiring the

municipal council of Dresden to submit a by-law to the electors for raising the sum of \$27,000 for the building of a public school, being the amount estimated therefor by the plaintiff.

By-law No. 332 was submitted to and voted on by the electors on March 18th, 1907, for raising \$27,000 by the issue of debentures for the required purpose, when a majority of the electors approved of the by-law.

The by-law was afterwards refused a third reading by the council.

After the plaintiff had been declared the successful competitor, the plans were returned to him with a request that he make some changes therein, which were indicated in a letter from the secretary. These changes had not been made in the plans up to about April 2nd, 1907, when he wrote J. H. Laird, saying: "You will, no doubt, think I have neglected you, and so I have in the school matter. . . . I had to let the school job hold up. I am going to finish school at once. Start this morning."

Laird answered on April 4th, saying: "I received your favour last night, and glad to hear from you. May say you need not be in any rush as to school plans, as our council (things) has refused to give by-law third reading. I do not know what turn the thing will take," etc.

The plans, with the desired changes therein, were returned to the board on May 1st, 1907.

On August 2nd, 1907 (after a resolution of the school board, dated June 7th), the council of Dresden submitted by-law No. 333 to a vote of the electors for raising \$25,000 by the issue of debentures for the building of a public school, which was defeated by about sixty votes.

At a meeting held on May 1st, 1908, at which all the members of the school board were present, an account from the plaintiff for complete plans and specifications of the proposed new school building, estimated cost \$28,000, at two and one-half per cent., amounting to \$700, was received, and, on motion, ordered to be paid.

At a special meeting of the school board, held on May 15th, 1908, at which all the members were present, the resolution of May 1st, that the plaintiff's account be paid, was, by the unanimous vote of the board, rescinded.

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The judgment of Mr. Justice Street, in *Smith v. Fort William School Board* (1893), 24 O.R. 366, is conclusive against the plaintiff's right to recover. That learned Judge, at p. 370, after referring to the clauses of the statute (now 3 Edw. VII. ch. 32, sec. 5 (O.)), said:—

“An examination of these provisions shews that, while the trustees of urban school boards may require the municipal council to levy and pay over to them the amounts needed for the ordinary expenses of the schools in their charge, their right to obtain money for the purpose of building a school-house, or buying a school site, is not an absolute one, but is dependent upon their being able to obtain the consent of another body, which may be the municipal council or may be the general body of public school supporters, according to circumstances. It is plain that however urgent they may deem their need to be that a school-house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers must be the same as if the legislature had in direct terms enacted that no urban school board should enter into any contract to build a school-house until they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it.

“It cannot be assumed that the legislature intended to allow them to contract a debt without any means of paying it. If allowed to contract the debt, and if they can manage to build the school-house, the fact that it has been built will almost compel the municipal council to pay for it, in many cases where they would have refused, and the electors would have refused to authorize the expenditure in advance, and thus the plain object of the legislature of enabling the council or the electors to consider it upon its merits, would be defeated. I think it highly necessary that none of the safeguards which the legislature has thought fit to interpose between the zeal or the possible extravagance of school boards, and the public which is to find the money should be disregarded.”

The school trustees had procured from the plaintiff a sketch of the proposed school building, with a description thereof and an estimate of the cost, which was all that was necessary for the

purpose of informing the municipal council of the amount required for the proposed new school building: *The Board of Education of the City of London v. City of London* (1901), 1 O.L.R. 284; *Toronto Public School Board v. The Corporation of the City of Toronto* (1902), 4 O.L.R. 468.

Counsel relied on *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, as entitling the plaintiff to recover. In that case the action was brought to recover from the defendants remuneration for services rendered at their request by the plaintiff, as an engineer, in preparing a report and plans with regard to a scheme of sewerage contemplated by the defendants and for other work done in connection therewith.

The judgment of Vaughan Williams, L.J., is founded on the law as enunciated by Wightman, J., in *Clarke v. Cuckfield Union* (1852), 21 L.J. (Q.B.) 349: That where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied.

See also *Nicholson v. Bradfield Union* (1866), L.R. 1 Q.B. 620, and *Bourne v. St. Marylebone Borough Council* (1908), 24 T.L.R. 322.

In the present case, had the by-law providing for the required amount been passed and the money raised by a sale of the debentures, the claim by the plaintiff of \$700 for the plans and specifications, based on the estimated cost of the school building at \$28,000, at two and one-half per cent., would have been payable out of the moneys so raised, as it would have been an expenditure in connection with the building of the school-house.

This is not an expenditure upon objects or for purposes within the lawful authority of the school board, and entering into the contract was *ultra vires* of the powers of the board and was not binding on them: *Toronto Public School Board v. The Corporation of the City of Toronto*, 4 O.L.R. 468.

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The action will be dismissed. Each party must pay their own costs.

The plaintiff appealed to the Divisional Court, and the appeal was argued, upon January 18th, 1909, before BOYD, C., MACLAREN, J.A., and BRITTON, J.

A. Weir, for the plaintiff, contended that under *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, the plaintiff was entitled to judgment; that the defendants were acting within their powers under the Public Schools Act, 1 Edw. VII. ch. 39, sec. 65, sub-sec. 4 (O.): *Toronto Public School Board v. Corporation of the City of Toronto*, 4 O.L.R. 468; 3 Edw. VII. ch. 32, sec. 5 (O.); 2 Edw. VII. ch. 40, sec. 6 (O.); 6 Edw. VII. ch. 53, sec. 42 (O.); that *Smith v. Fort William School Board*, 24 O.R. 366, followed by MacMahon, J., was decided under previous statutes; that the plaintiff's work here was preliminary to finding out the cost, so as to make it possible to vote on the by-law intelligently.

Leighton McCarthy, K.C., for the defendants, contended that there was no bargain to pay the plaintiff unless the school was built; that if compensation is to come out of the work and there is no work, there must be no pay; that, even if the plaintiff had a contract with the defendants, it was *ultra vires* under *Smith v. Fort William School Board*, *supra*; that the plaintiff took chances on the competition as to whether he would be employed or not; and that the statutory enactments cited had nothing to do with the case.

February 11. BOYD, C.:—I think the evidence fails to prove a contract made between the plaintiff and the defendants by which they are liable to pay for the plans prepared by the plaintiff. The plans were the outcome of a competition in response to an advertisement of the defendants to submit plans for the erection of a proposed school-house on the terms contained in a printed circular. The architects competing were to observe the rules and instructions therein set forth. One clause relates to "compensation," and is thus expressed: "Providing a plan is decided on, approved by the proper authorities, the trustee board will commission the author of the designs selected by them in this competition to take charge of the work at a compensation to be agreed upon."

"The authors of the designs given second and third places shall receive ten dollars and five dollars respectively."

That embodies the express contract, which intended that the successful competitor shall be paid by being put in charge of the work, when it goes on, at a compensation to be then agreed on. This is not a contract to pay in any event, but only if the plan is approved by the proper authorities under the School Act, and if the building is voted upon and sanctioned by the electors, and a by-law passed to authorize the necessary expenditure. The whole engagement rests upon a contingent footing, and no by-law has been passed for the erection of the building: Whatever use may have been made of the plans in the way of exhibiting the proposed structure was one of the incidents contemplated when competition was invited. The defendants are not in the position of ordinary employers intending to build and calling for plans, who are able to control the process of building, but this was merely a tentative preliminary to ascertain whether the building, as planned, would be built or not, and that depended on funds being supplied by the municipality, in response to the vote of the electorate. In the contract proved there is inherent contingency as to the compensation of the successful architect. He rests upon the prospect of superintending the work if and when it is allowed to be done. That point has never been reached. Then is he to be allowed to recover, on the footing of an implied contract, a sum certain as *quantum meruit*? Such a course would appear to me to be repugnant to or inconsistent with the written contract and to introduce an element of certainty which is foreign to its import. The price to be paid for the plans supplied by the competitors ranking second and third shews that compensation for plans was being considered and provided for in the circular, but in the case of the first competitor he was to be otherwise compensated—he was to be content to take the chance of the building being erected according to his plan. The reasoning in *Tilley v. Cook Co.* (1880), 103 U.S.R. 155, appears to be applicable; and on this ground I would affirm the judgment in appeal.

But assume that the plaintiff should be paid for his plans on the basis of a *quantum meruit*, then how much does he deserve? All would have to be taken into account. It is expedient to

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regard the manner in which these plans came to be in the shape they are, and I sketch the development from the correspondence.

History of plaintiff's plans, so far as can be gathered from the evidence and exhibits:—

May 16, 1906.—Laird, of school board, writes Erb that the board had advertised for pencil drawings and estimates for a new school-house, and asks him to give attention and to say that he saw the advertisement in the papers (*i.e.*, to conceal Laird's intervention).

August 17, 1906.—Miller (principal of school and secretary of board) writes Erb: refers to plan of school made by Erb, then in the hands of Laird, and thinks it can be modified to suit what is needed. (Admonition to say nothing to others of board as to this or other like communications.)

August 27, 1906.—Erb writes to Miller (letter to be kept quiet) of plan and sketch, which he encloses, to be given to Laird.

November 12, 1906.—Dr. Thornton, of the board, writes friendly letter to Erb (not to be made known) about plans prepared already by Erb as to school-house. A few of the board think his plans all right, yet the inspector says that changes must be made as to both front entrance and rear entrance. Suggests having changes made to accord, and bringing them down to the meeting.

November 15, 1906.—Erb answers he will go and take rough drawings, making amendments from criticism. Is surprised that architects are to be there with their plans.

November 20, 1906.—Plans for school-house presented to school board at a meeting, when Erb and two other architects, all with their plans, are present. Resolved that council of board prepares advertisement and instructions for competitive plans, and Laird, Thornton and Miller named as committee.

Letter (about this time, with no date).—Erb to Laird, in which he gives suggestions as to preparation of instructions and that names of architects be not disclosed.

December 26, 1906.—Erb to Laird, telling that he is sending in practically the same plan as already shewn, and, "of course, I know that you will recognize it."

December 28, 1906.—Seventeen plans sent in.

January 7, 1907.—Laird moves that plan V be chosen and accepted as first (which is the plaintiff's).

February 2, 1907.—Plans being submitted to Inspector Ellis for approval, he pointed out objections to Erb's designs and the probable cost, and prepares another plan signed "Economy," but, in deference to the board and with reservation, he approves of Erb's plans.

February 8, 1907.—Board orders plans to be returned to respective owners, and Miller is to correspond with Erb as to some minor changes to be made in his plans.

February 23, 1907.—Council refuses to raise money for the school, and requests that it be submitted to vote of the electors.

March 18, 1907.—By-law approved by electors by small majority, and on that Laird so informs Erb, and next day—March 19th—writes him about timber to be supplied and as to salt block to be built in the United States, as to which Laird hopes to get some help from Erb.

March 17-22.—Plans appear to have been in Laird's hands for the purposes of the vote.

March 22, 1907.—Postcard from Thornton to Erb that plans returned to Erb that morning.

April 4.—Laird to Erb that he need not be in a hurry to work on plans (*i.e.*, as to the minor changes), as the council had refused to give the by-law a third reading.

April 24, 1907.—Erb says he had the plans completed—*i.e.*, by the addition of minor changes.

June 7, 1907.—Board requests council to submit a new by-law to vote for raising \$25,000 only.

August 5, 1907.—This was submitted and defeated.

May 1, 1908.—Completed plans first forwarded to school board and payment of \$700 demanded.

It is from this disposition of dates and the terms of the correspondence that I think there was not a fair competition, and that the plaintiff's plans were not the best.

It appears that sketches or plans for the building were supplied gratuitously by several architects (the plaintiff with others), and that these would have been sufficient, in the opinion of the trial Judge, to have informed the council as to what was contemplated. But a competition having been desired, the plaintiff sent in then practically the same plan, or on the same lines, as had been already prepared and as had been before the board in the

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form of a sketch, so that no special effort of creation or construction was put forth by the genius of the architect on the competing plan. Then look at the scale of prices for the second and third prizes: one to get five and the next ten dollars. At the same ratio twenty dollars would be the meed of the plaintiff. If this should be doubled and forty dollars allowed, would not that be ample? So I think, but if this was given and only lower scale of costs and set-off allowed on higher scale, what would be coming to the plaintiff—perhaps a negative quantity. On this ground also I would not interfere.

MACLAREN, J.A.:—I am unable to agree with the trial Judge that the work done by the plaintiff, at the request of the defendants was wholly outside the scope and powers of the latter. As it is part of the duty of the board to provide adequate school accommodation, and for this purpose, subject to the provisions of the School Act, to build school-houses, etc., I consider it not only within their powers, but a part of their duties to undertake in a proper case the necessary preliminary work; first, for their own information, and next for the information of the council or the electors, as to the cost, etc., of the proposed school building, in order to secure the passing of the necessary debenture by-law: Public Schools Act, 1 Edw. VII. ch. 39, secs. 65 (3) and (4) and 76 (O.), as amended.

To this extent the case would appear to come within the authority of those cases which decide that no seal is necessary where work is done or services rendered at the request of a corporation in respect of matters within its powers, and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of an individual. A similar implication should be made in the case of a corporation. See *Lawford v. Billericay Rural Council*, [1903] 1 K.B. 772; *Bourne v. Marylebone Corporation*, W.N. 1908, p. 52.

It was strongly argued before us that the contract in this case was that the remuneration of the plaintiff was wholly conditional upon the passing of the necessary by-law for the issue of the debentures for the erection of the school-house, and that the by-law having been defeated by the electors, the plaintiff was not entitled to anything for the work he had done. To determine this it is necessary to look at the contract to see if there is sufficient in it to negative the presumption above referred to.

The clause in the invitation of the defendants under which the competitive plans were sent in relating to compensation, was as follows: "Providing a plan is decided on and approved by the proper authorities, the trustee board will commission the author of the designs selected by them in this competition to take charge of the work at a compensation to be agreed upon. The authors of the designs given second and third places shall receive ten dollars and five dollars respectively."

The plaintiff's plans were decided on by the board, and approved by the proper authorities under the Public Schools Act. At the request of the defendants, he made some changes in and additions to the plans and specifications. These plans were used by the board in discussing and deciding upon the question of a new school-house and in their application to the council for a debenture by-law and laying the matter before the electors. In so far as they were necessary or even useful for this purpose, I fail to see why they should not be paid for as well as any other proper expenditure in connection with the by-law. There is nothing in the conditions or the contract to suggest that the defendants were to get this benefit from the plaintiff's work without compensation.

The contract was a divisible one, consisting of three separate parts: (1) preparation of plans, (2) of specifications, and (3) taking charge of the work. It was beneficially performed in part and the defendants used and took the benefit of what was done, and it was through no fault of the plaintiff that it was not carried through in its entirety. I am therefore of opinion that the defendants should pay a proper sum for that portion of the work which they so used and had the benefit of, unless there is something special in the contract which relieves them and rebuts the ordinary presumption. On this point I think it falls within the authority of such cases as *Burn v. Miller* (1813), 4 Taunt. 745; *Manson v. Baillie* (1855), 2 Macq. H.L. 80. See also Leake on Contracts (5th ed.), p. 418.

The "compensation to be agreed upon," under the clause of the contract above quoted, was clearly to have been not only for taking charge of the work, but also for the preparation of the plans and specifications, and as the contract for the work was in its nature divisible, so also the compensation would be

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divisible and apportionable. If the defendants intended that, in the event of the work not being proceeded with, they were to be at liberty to use the plaintiff's plans without paying anything for them, they should have said so clearly, instead of using language of which the natural meaning confirms what is the ordinary presumption in such a case, instead of rebutting it.

I think a fair allowance for that portion of the plaintiff's work which was used by and was of benefit to the defendants would be \$125.

The evidence was not directed as to the precise value of that part of the work which, in my opinion, is properly chargeable against the defendant, but rather points to a larger amount. In all the circumstances of the case, I think this amount, with county court costs and no set-off, will be a proper disposal of the case.

The appeal should therefore be allowed with costs and the cross-appeal dismissed with costs.

BRITTON, J.:—The action is to recover remuneration for plans and specifications prepared by the plaintiff, an architect, for the defendants for a new public school building which the defendants proposed erecting at Dresden.

The learned trial Judge dismissed the action on the ground that an expenditure for plans and specifications was *ultra vires* the school board, and so not binding upon them.

I am of opinion, with great respect, that, at all events, since the enactment of 1 Edw. VII. ch. 39, sec. 65 (O.), it is quite within the power of trustees of public schools to employ an architect for hire to prepare plans, etc., for a proposed school-house.

Section 65. "It shall be the duty of the trustees of all public schools, and they shall have power"—sub-sec. 4 "to purchase or rent school sites or premises, and to build, repair, furnish and keep in order the school-houses, furniture, fences and all other school property," etc.

I regard plans and specifications as a necessary pre-requisite to building, and even to an application to a municipal council or to submitting a by-law to the people. The ratepayers are entitled to know, and it is the duty of, or certainly within the power of the trustees to procure and submit plans and specifications.

*Smith v. Fort William School Board*, 24 O.R. 365, does not go the length of saying that the trustees could not, under the law then in force, do what may be called preliminary work. The learned trial Judge in this case concedes that, for he says:—

“The school trustees had procured from the plaintiff a sketch of the proposed school building, with a description thereof, and an estimate of the cost, which was all that was necessary for the purpose of informing the municipal council of the amount required for the proposed new school building.” The defendants did not depend upon the plaintiff making a gift to them of the plan and sketch mentioned. The fact that it was reasonably necessary to procure plan and sketch, and that they did procure such, from an architect, establishes liability to pay or to provide money to pay, unless there is some agreement or some other thing which would deprive plaintiff of reasonable remuneration.

Upon the argument on appeal, it was strongly urged that, by the terms of plaintiff's employment, he was to get no compensation or remuneration unless the work of building the school was proceeded with. If the work should be proceeded with, the defendants were to engage the plaintiff to take charge of the work “at a compensation to be agreed upon.”

The plans were competitive plans.

The defendants, having full authority, as I venture to think, appointed a committee “to secure plans and specifications for a proposed new school building.”

That committee, for the purpose of giving all architects who should be notified an equal chance in preparing plans, if they should so desire, formulated certain “rules and general instructions,” which were fully set out and which the architects submitting plans were asked to carefully observe.

The rules and instructions in reference to compensation are as follows:—

“Compensation.”

“Providing a plan is decided on and approved by the proper authorities, the trustee board will commission the author of the designs selected by them in this competition to take charge of the work at a compensation to be agreed upon.

“The authors of the designs given second and third places shall receive ten dollars and five dollars respectively.”

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Plans and specifications were prepared and presented to the defendants, and those of the plaintiff were selected. The plans of other architects were considered, and two were awarded second and third places, and their authors received ten dollars and five dollars respectively. The defendants having selected plaintiff's plan, ordered certain other work to be done upon it or in reference to it, and other work, more or less, was done by the plaintiff according to the instructions of the defendants or their committee.

The proposed school-house was never built, and the defendants now contend that they are not liable to pay to the plaintiff anything for the plans and specifications prepared by him.

Apart from any special agreement and according to all the authorities, an architect, employed as such, and who as such prepares plans and specifications for the owner, in accordance with the directions of the owner, is entitled to remuneration. The present plaintiff is therefore entitled to remuneration unless deprived of it by the rules or conditions upon which the plaintiff did his work. These rules do not expressly say that he shall get no remuneration other than what he possibly may get under some agreement to be made if the work proceeds, and if the plaintiff should be put in charge of it.

There was not an express agreement that the plaintiff should get nothing in the event of the school-house not being built. And, in my opinion, no such agreement can be inferred from what took place between the parties. If the defendants had intended that the plaintiff should not be paid anything if the work was not proceeded with, they would have said so when providing that the architects getting second and third places were to get respectively a small sum. The plaintiff having done work—work of a beneficial character to defendants—work accepted by defendants, presumably is entitled to be paid. The presumption is not rebutted in the present case by anything that took place between the parties. In fact, there apparently was care to avoid saying that plaintiff would not be paid in the event of the school-house not being built. It is of some importance that the defendants, on May 1st, 1908, passed a resolution that plaintiff should be paid. That resolution was subsequently rescinded. The defendants cannot be bound by the resolution to pay if otherwise not liable, but the resolution

speaks what was in the mind of the defendants when the resolution was passed, and that is that the plaintiff was entitled to remuneration. It is an admission in the only way the defendants as a corporation could make an admission, and as such is an admission of liability for some amount. Suppose the school-house had been built, and the parties could not agree as to plaintiff's remuneration for his supervision of the work, both parties acting in good faith, but no agreement, the plaintiff ought not, as it seems to me, to be deprived of pay for initial work asked for and accepted by the defendants. Then there is no evidence that even the plan prior to the competitive plan should not, after its acceptance, be paid for. That plan, the learned trial Judge says, was sufficient. Even although not to be paid for when first prepared, if afterwards it was accepted, and used in submitting a by-law, something should be paid for it.

I think plaintiff should be paid. It is rather difficult to say just how much the plaintiff should get upon a *quantum meruit*. From a careful reading of the evidence, the inference is warranted that the plaintiff did not, prior to the rejection of the by-law to build, spend a great deal of time upon these plans and specifications. Completed plans were not presented to the defendants until after refusal to pay, and then probably a tender for purpose of this action. That does not disentitle plaintiff to recover for what he did furnish and what the defendants accepted. The instructions to plaintiff really limit the work very much:—

"The drawings required are as follows: (1) basement, (2) first floor, (3) second floor, (4) front elevation, (5) south elevation, (6) perspective from north-west.

Drawings to be executed to uniform scale of  $\frac{1}{8}$ -inch to foot, and finished in line only, without shading, in India ink, etc., etc." There were other limitations intended to reduce labour and consequently cost. There was a good deal of correspondence, suggestion and discussion which had reference to carrying the by-law, other than necessary work in the preparation of the preliminary plans and specifications. It was a plain building, but would have cost a large sum of money by reason of its size. The ordinary percentage charge for what was done would not be proper in this case.

Upon the best consideration I can give, the plaintiff should

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get \$125, with costs of action and of appeal. Costs to be on county court scale, and no set-off of costs should be allowed.

The defendants' cross-appeal dismissed without costs.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

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*Criminal Law—House of Ill-fame—Frequentier—"Habitual Frequentier"—Conviction—Omission of Averment of not giving Satisfactory Account of Himself.*

The prisoner was charged and convicted with being on a specified occasion "a frequenter of a house of ill-fame," it not being stated that he was in the "habit of frequenting," under sections 238, 239 of the Code, or was an "habitual frequenter," under section 773 of the Code, and without anything appearing in the conviction to shew that he was asked to give, or failed to give, a satisfactory account of himself:—

*Held*, that no offence was shewn in the conviction; and the prisoner was discharged on *habeas corpus* proceedings.

THIS was a motion on behalf of the prisoner, on the return to a writ of *habeas corpus*, for his discharge from custody under a conviction by the police magistrate for the town of North Bay for frequenting a house of ill-fame.

The information laid before the police magistrate of the district of Nipissing charged that the prisoner was, on the night of the 21st September, 1908, at the town of North Bay, in the district of Nipissing, "a frequenter of a house of ill-fame."

On September 22nd the prisoner was brought before the police magistrate for trial, and was convicted by him, the conviction stating that he pleaded guilty, and he was sentenced to be imprisoned in the Central Prison for the space of six months.

Affidavits were filed on behalf of the prisoner to shew that on the charge having been read over to the prisoner at the trial by the police magistrate, and on his being asked to plead to the charge, he said he was collecting rent at the said house, and that if the magistrate called that guilty, he was guilty.

The affidavits also shewed that he had leased the contents of the house, to its occupants, and that he went there to collect the rent.

The magistrate filed an affidavit in reply, stating that it was not until after he had convicted and sentenced the prisoner that he made the statement as to his going to the house to collect the rent.

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On October 5th, 1908, the motion was heard before ANGLIN, J., sitting in Chambers.

*H. L. Dunn*, for defendant.

*J. R. Cartwright*, K.C., for the Crown.

At the conclusion of the argument the learned Judge delivered the following judgment:—

ANGLIN, J.:—Counsel for the prisoner raises two points: first, that the accused did not plead guilty, as the conviction recites; second, that the statement of his alleged offence in the conviction and information is insufficient.

As stated during the argument, my view is that, as to the first point taken, the evidence here does not warrant the conclusion that the accused did not plead guilty, as stated in the record. The affidavit of the convicted man is in direct conflict with that of the magistrate. The affidavit of the other affiant for the prisoner does not contradict the affidavit of the magistrate. He does not say when the statement, "I am guilty, if you call going to collect rent guilty," was made, but merely that he heard it at some time in the course of the proceedings. The magistrate says this statement was made, but not until after conviction had been recorded, and when he was proceeding to pronounce sentence. Lamothe himself says the statement was his answer to the magistrate's question: "Are you guilty or not guilty?" I think I must rely upon the record, and rule that the question sought to be raised by the prisoner cannot be further inquired into here. The record itself shews a plea of guilty to the charge laid, and it would be quite unsafe to disregard the record upon such evidence as we have here.

Mr. Dunn next contends that the offence of which his client has been found guilty must necessarily be made out under sec. 238 of the Code, and that the information and conviction do not disclose an offence under that section, because of the omission of the word "habitual" before the word "frequenter," and the allegation that the accused "did not give a satisfactory account of himself."

Mr. Dunn argues that sec. 773 (f) of the Code merely prescribes

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a procedure for trial and the punishment for the offence created by sec. 238, and does not itself declare or define an offence. But in *Regina v. Clark* (1883), 2 O.R. 523, referred to by Mr. Dunn, it was held that sec. 2 (6) of the Act 32 & 33 Vict. ch. 32, which corresponds with the provision now found in sec. 773 (f), did in fact create or declare an offence independently of sec. 1 of sec. 28 of 32 & 33 Vict., which corresponds with the provisions of sec. 238 of the Code. I think I must follow that decision. I would point out, in support of that contention, that sub-sec. (g) of sec. 773 indicates the form of expression which the Legislature adopts when it intends not to create an offence, but merely to provide a penalty for an offence already in existence and created under another section. The form of clause (g), when it is contrasted with the clauses (a) to (f), inclusive, indicates that in the earlier clauses it was intended to declare offences.

I therefore proceed upon the view that sec. 773 (f) creates or declares a distinct offence. This renders it unnecessary to consider the omission of the words "did not give a satisfactory account of himself," which are not found in sec. 773 (f).

The only remaining question is whether the omission of the word "habitual" before the word "frequent" suffices to render this information and conviction insufficient under sec. 773 (f). Mr. Justice Armour appears to have taken that view in the case of *Regina v. Clark*, already referred to. That, however, was not the sole ground upon which the case was disposed of. Moreover, since that decision, an English Divisional Court has held, in *Clark v. The Queen* (1884), 14 Q.B.D. 92, that the words "frequent" and "frequentier," themselves, have a meaning quite as wide as any that could be given to the phrases "habitually frequent" or "habitual frequentier." In this English case Webster's definition of the verb "to frequent" is approved. The definition is, "to visit often, to resort to often or habitually." "Frequenting" implies the habit of being at a place. In deference to what the Privy Council has said in *Trimble v. Hill* (1879), 5 App. Cas. 342, and to the course taken by a Divisional Court in *Hollender v. Ffoulkes* (1894), 26 O.R. 61, and *Johnston v. Barkley* (1904), 10 O.L.R. 724, greatly as I respect any expression of opinion by the late Chief Justice Armour, I think I should accept and act upon the view expressed by the English Divisional Court in *Clark v. The Queen*, as to the meaning and effect of the words "frequent" or "frequentier."

I do not myself see how the word "habitual" can add anything to the meaning of the word "frequenter." I think the word "habitual" is merely tautologous, and that the statement that the defendant is a frequenter is in itself sufficient to meet the requirements of sec. 773 (g).

Mr. Cartwright alludes to the provisions of sec. 852, which, aided by the interpretation clause, sub-sec. 16 of sec. 2, he contends, justify the view that it is not necessary in a conviction to employ the exact words of the statute in describing the offence. I would refer to secs. 1124 and 1130 of the Code. Applying these provisions, and for the reasons that I have already stated, I think the objection on the ground of the omission of the word "habitual" should not be sustained.

The motion for discharge must be refused, and the prisoner remanded to custody.

From this judgment the prisoner appealed to the Court of Appeal.

On November 18th, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*H. L. Dunn*, for the appellant. The evidence submitted by affidavit shews that the appellant pleaded guilty under a misconception. All he meant was that, if visiting the house constituted the offence, then he was guilty. The magistrate should have allowed the appellant to have withdrawn his plea of guilty, and to plead not guilty, and to have tried the case. The offence is laid under sec. 238 (k) of the Criminal Code, R.S.C. 1906, ch. [J. R. Cartwright, K.C.: The charge was laid not under this section, but under sec. 773 (f)]. Section 773 (f) does not apply. It merely deals with procedure. It is embraced in Part XVI., which relates to the summary trial of indictable offences, while Part V., which includes sec. 238 (k), deals with offences. *Regina v. Clark*, 2 O.R. 523, is distinguishable. The acts there referred to were two distinct acts each creating an offence, while the Code is one entire Act dealing with various subject matters, one part dealing with offences and another part with procedure. The decision, moreover, is not binding on this Court. Even if this section were deemed to apply, the conviction would be bad for the omission of the word "habitual" before "frequenter." Assuming, then, that the offence

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came within sec. 238 (k), not only should it have been proved that the appellant was a frequenter, but that he was given an opportunity of giving a satisfactory account of himself. The appellant was not a frequenter. Only one visit to the house is proved, and this would not make him a frequenter: *Clark v. The Queen*, 14 Q.B.D. 92. Then there is the fact established by the affidavits that he attended for a perfectly lawful purpose, namely, to collect the rent.

*J. R. Cartwright*, K.C., for the Crown, respondent. The offence was properly laid under sec. 773 (f). The case of *Regina v. Clark*, 2 O.R. 523, is especially in point. The distinction attempted to be made as to the effect of the Code is not tenable. Then as to the omission of the word "habitual," there is no distinction between "frequenter" and "habitual frequenter." They are synonymous terms: *Murray's Imp. Dic.*, *Century Dic.*, *Standard Dic.*, *tit.* "frequenter"; and he is charged with and admits being a "frequenter" by pleading guilty to the charge. It was not essential that the conviction should shew that the appellant had the opportunity of explaining his visits. The Court must deal with the record as presented, and cannot look at affidavits produced to contradict it, especially in the face of the denial made by the magistrate.

November 30. GARROW, J.A.:—It is a pity the magistrate did not allow the prisoner to withdraw his plea of guilty and try the case on the evidence. That, I think, would have been the proper course, even on the facts as stated by the magistrate.

As to the questions of law argued before us, it is conceded that if the conviction was made under secs. 238, 239, of the Criminal Code, it cannot be supported.

Under these sections "every one is a loose, idle or disorderly person or vagrant, who . . . (k) is in the habit of frequenting such houses (*i.e.*, a disorderly house, bawdy house or house of ill-fame or house for the resort of prostitutes), and does not give a satisfactory account of himself or herself," and is liable on summary conviction to a fine not exceeding fifty dollars, or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both.

The charge in the information is that the prisoner was at the date mentioned "a frequenter of a house of ill-fame," and the conviction finds and states "that he, the said Fred Lamothe, was

a frequenter of a house of ill-fame, and I, the said Sylvanus Weegar, adjudge the said Fred Lamothe for the said offence to be imprisoned in the Central Prison and there kept at hard labour for the space of six months less one day," nothing appearing in the conviction to shew that he was asked to give or that he failed to give a satisfactory account of himself: see *Regina v. Levecque* (1870), 30 U.C.R. 509.

But it is contended by the Crown that the conviction can be supported under sec. 773 of the Code. That section forms part of part XVI., under the head of "Summary Trial of Indictable Offences," and the sub-head "Jurisdiction," and says that "Whenever any person is charged before a magistrate . . . (f) with keeping or being an inmate or *habitual* frequenter of any disorderly house, house of ill-fame or bawdy house . . . the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way." Section 774 declares that in such cases the jurisdiction of the magistrate shall be absolute, and shall not depend on the consent of the accused, and that "this part" shall not affect the absolute summary jurisdiction given to any justice or justices in any case by any other part of the Act. Section 781 provides that in any case summarily tried under paragraphs . . . (f) . . . the magistrate may impose imprisonment, with or without hard labour, for any term not exceeding six months, or may impose a fine not exceeding with the costs \$100, or both. And the case of *Regina v. Clark*, 2 O.R. 523, was relied on as authority for the proposition that sec. 773 creates a substantive offence, namely, that of being "an habitual frequenter of a house of ill-fame." The authority of that case was probably binding upon Anglin, J., although he declined to follow it upon the other branch that the omission of the word "habitual" was fatal, preferring to follow, as he said, the more recent decision in England of a Divisional Court in *Clark v. The Queen*, 14 Q.B.D. 92. But on looking at that case I am unable to see anything in it to justify the conclusion that it is in any conflict with what was said in *Regina v. Clark* in the Ontario Court. In the English case the Court was dealing with the word "frequents," and very properly, I think, concluded that a man could not be said to "frequent" a street when the evidence only proved that he had been seen there once. The question there was one of evidence which was held to be insufficient; here it is one of pleading. And in my opinion the decision in *Regina v. Clark* upon the question of pleading was correct.

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But I am also of the opinion that the conviction in question should be ascribed to secs. 238, 239, rather than to sec. 773.

The origin of secs. 238, 239, is the statute 32 & 33 Vict. ch. 28, "An Act respecting Vagrants," and the origin of sec. 773 is 32 & 33 Vict. ch. 32, "An Act respecting the Prompt and Summary Administration of Criminal Justice in Certain Cases." Both statutes were assented to on the same day. There is to me no perceptible difference between the expressions used in the first, as applied to an offender, of being "in the habit of frequenting," and in the second of being "an habitual frequenter." And there is not the slightest apparent reason why the first should be let off with an imprisonment of two months (since increased to six months), the maximum under the first statute, while the second, who on the Crown's present theory need not even be asked to give an account of himself, should be subject to six months' imprisonment, or why under the one statute the fine may be fifty dollars, and under the other hundred dollars. It is the one circumstance that the punishment may be greater under the second than under the first, which for a moment lends colour to the Crown's contention. That there is confusion calling for legislative correction may be admitted. The confusion arises, in my opinion, from the circumstance that most of the offences mentioned in sec. 773 are also indictable offences calling for more severe punishment than those prescribed in the Act respecting Vagrants. But reading the whole section, together with its history, I am of the opinion that there was no intention to create under it any new offence whatever, but merely to recapitulate a series of offences already existing and to provide for their speedy trial. And in this recapitulation the minor offence of the habitual frequenter, and possibly also of the inmate of such a house, whose cases were already provided for under the vagrancy sections (the keepers being liable not only under those sections but also under one of the "Nuisance" sections, namely, sec. 228), were by oversight ncluded.

This construction may not be in harmony with one or more decisions, for instance, *Regina v. Conlin* (1897), 29 O.R. 28, but it is the only one which under all the circumstances, and after much consideration, commends itself to me. But the conviction is, as I have pointed out, bad in either view, and the prisoner must be discharged.

OSLER, J.A.—I agree with the opinion of my brother Garrow, and have nothing to add, except that the case might well have been disposed of on the authority of the decision of Armour, C.J. in *Regina v. Clark*, 2 O.R. 523.

MOSS, C.J.O., and MACLAREN, J. A., concurred.

MEREDITH, J.A.:—This is an application to discharge a prisoner from custody under a writ of *habeas corpus*. The return to the writ shewed that the prisoner was detained under a warrant of commitment based upon a conviction made by a police magistrate. The application was heard by a Judge of the High Court and refused, and now comes on here by way of appeal against the judgment of that Judge.

It is not suggested that, if there is any offence described in the conviction, the case was not one within the jurisdiction of the magistrate; it is quite clear that it was. But the prisoner sought to shew that his conviction was not proper; that the magistrate acted upon a plea of guilty when in truth the prisoner had not meant to plead guilty nor had so pleaded. The Judge at Chambers went fully into that question of fact and found against the prisoner upon it. I am not sure that any such question can be raised upon such an application as this; but it is not needful for me to consider that question, as I am of opinion that, upon another ground, the prisoner was and is entitled to be discharged from custody under the writ. It may be proper, however, to add that, if the facts were just as the magistrate has stated them, the prisoner ought to have been allowed to withdraw the plea of guilty, and have been given a full and fair trial, if he really desired it.

The return shews that the prisoner is detained under a conviction of a police magistrate "for that he . . . was a frequenter of a house of ill-fame." That conviction was made under sec. 773 of the Criminal Code, the magistrate exercising the absolute power conferred upon him by the next following section. In each of these sections the offence is described as "being an . . . habitual frequenter of any . . . house of ill-fame . . ." So that the single question is whether there can be any difference between a "frequenter" and "an habitual frequenter." Mr. Cartwright's contention was that each expression could but mean the same thing. In that I am unable to agree. Frequency may differ in degree and

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in character. It is not a superlative term; indeed, it seems to me obvious that there may be a wide margin between a frequenter only and a frequenter whose frequency has become habitual.

That one may be a frequenter of a place though he has not been there very often is indicated by the case of *Clarke v. The Queen*, 14 Q.B.D. 92. The learned Judges in that case would go no further than determine that one occasion was not enough to make one a frequenter. No one need be so wary when the question is, does one instance, or indeed half a dozen instances, make anyone an habitual frequenter. There may certainly be a difference between a drunkard and an habitual drunkard. The latter term is frequently meant to comprise the character as well as the frequency of the drinking—indicating irresistible, as well as frequent, indulgence. It is unquestionable that the word “frequenter” may very properly be applied to one who habitually resorts to a place, but it does not follow that less than an habitual resort may make one a frequenter. The dictionaries were much relied upon by Mr. Cartwright, but they are not altogether in his favour, rather they are against him for the reason just stated—that is, they give to the word a more restricted, as well as the wider, meaning.

In Murray's Dictionary, of the meanings given to the word frequent, the first is, “to visit or make use of (a place) often; to resort to habitually; to attend (a meeting, etc.)”; and the one meaning given to the word frequenter is, “one who frequents or resorts to (a place), one who attends (a meeting, etc.);” while the several meanings given to the word habitual shew very plainly that it is by no means an impotent or meaningless word, or one synonymous with frequent: “inherent or latent in the mental constitution,” “fixed by habit, customary, constantly repeated or continued,” being some of them.

According to the views expressed by Wilson, C.J., in the case of *Arscott v. Lilley* (1886), 11 O.R. 153, at p. 181, persons may be frequenters of a house of ill-fame for lawful and indeed for laudable purposes, for instance, “to preach to, or to admonish the inmates of such houses, to visit them in sickness . . . or for the collection of rent or debts;” and so if the words “habitual frequenter” mean no more than the word “frequenter,” such persons would be subject, under the section of the Code in question, to the absolute jurisdiction of the magistrate, and liable to imprisonment for six months, as

well as to a fine of \$100. That extraordinary result is prevented, under the other section of the Code, 238, by the words enabling a frequenter to "give a satisfactory account of himself or herself," and in the section in question, by the word "habitual," which I think must carry with it a meaning of both impropriety and recurrence indicative of an evil habit of mind and body.

The only case in point, of which I am aware, is *Regina v. Clark*, 2 O.R. 523, and it is directly in the prisoner's favour.

I cannot doubt that sec. 773 gives "absolute jurisdiction" to a "magistrate," in such a case as this, quite independently of sec. 238; and I am not aware of the contrary having been contended for ever since the case of *Regina v. Clark* was decided. Some of the reasons for the legislation in question are referred to in the case of *Rex v. Lee Guey* (1907), 15 O.L.R. 235, at p. 242. The conviction in question was obviously under secs. 773 and 774, for under those sections only had the magistrate the "absolute jurisdiction" which he exercised.

That the crime in question is not that provided against in sec. 238 is made very plain when the original of each section is looked for. That of sec. 238 is the Vagrant Act passed long after summary jurisdiction to punish habitual frequenters of houses of ill-fame existed. See the Recorder's Act, Consol. Stat. C. (1859), ch. 105, sec. 1, sub-sec. 7.

I would allow the appeal.

G. F. H.

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## [IN THE COURT OF APPEAL.]

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Oct. 19.

*Criminal Law—Conviction for Keeping a Disorderly House—Habeas Corpus—Statement of Offence—Counsel for Defendant—Refusal of Adjournment to Procure—Discretionary Power of Magistrate—Jurisdiction—Criminal Code, secs. 238 (j), 715, 722.*

The defendant was convicted before two justices of the peace for being the keeper of "a disorderly house of prostitution or house for the resort of prostitutes," and was sentenced to six months' imprisonment in gaol. On application being made for her discharge upon a writ of *habeas corpus*, it appeared by her affidavit which was not contradicted, that the magistrates had refused to adjourn the trial to enable her to procure counsel, but it did not appear that any injustice was caused by the refusal of the adjournment:—

*Held*, affirming the order of Meredith, C.J.C.P., that the conviction was not in the alternative, specifying two offences, but properly set out one offence under sec. 238 (j) of the Criminal Code.

*Rex v. Leconte* (1906), 11 O.L.R. 408, followed.

2. The defendant, under sec. 715 of the Criminal Code, had the absolute right to the assistance of counsel if she could obtain it, but was not entitled as of right to an adjournment for the purpose of enabling her to do so. That was a matter within the discretion of the magistrates under sec. 722, and their refusal to adjourn did not affect their jurisdiction so as to enable the defendant to quash the conviction in a *habeas corpus* proceeding.

*Reg. v. Biggins* (1862), 5 L.T.N.S. 605, followed.

APPEAL by the defendant from order of Meredith, C.J.C.P., upon the return of a *habeas corpus*, refusing to discharge her from custody.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A., on 7th October, 1908.

*H. L. Dunn*, for the defendant.

*J. R. Cartwright*, K.C., and *Edward Bayly*, for the Crown.

October 19. OSLER, J.A.:—Appeal by defendant from the judgment of the Chief Justice of the Common Pleas Division.

The defendant was convicted by two justices of the peace for the district of Nipissing for that, on the 27th June, 1908, at the township of Bowman, in the said district, she did keep a disorderly house of prostitution or house for the resort of prostitutes. She was sentenced to six months' imprisonment in the common gaol and committed. On motion for her discharge upon a writ of *habeas corpus*, the conviction and commitment were sustained, and the appellant remanded. There is no note or report of the reasons for judgment.

The appeal, in my opinion, fails.

It was urged that the conviction was in the alternative, specifying two offences, and therefore that neither was properly charged. But it appears to me that only one offence is charged, though described twice in slightly different language. To keep a "disorderly house of prostitution" is to keep a "disorderly house, bawdy house or house of ill-fame," the latter being one description of the offence in sec. 238 (j) of the Criminal Code; an alternative description of the same thing is by the same clause to keep a house for the resort of prostitutes. All three forms of expression charge the same thing, and the point seems to be covered by our recent decision in *Rex v. Leconte* (1906), 11 O.L.R. 408, 11 Can. Cr. Cas. 41.

(2) The accused was charged, tried and convicted on the same day, and there is evidence that after 12 o'clock on the previous night—in other words, in the morning of the same day—she was committing the offence charged in the information, though there was also evidence that she had been doing so a fortnight before.

(3) It was said that the magistrates had refused to adjourn the trial to enable the accused to procure counsel. This appears by her uncontradicted affidavit, though there is no record of the fact in the proceedings before the magistrate. But, inasmuch as she gave evidence on her own behalf, and in plain terms shewed that the charge was well founded, it does not appear that any injustice was occasioned by the refusal of the adjournment. Under such circumstances it cannot be said that she was not, in the language of sec. 715 of the Code, "admitted to make her full answer and defence to the charge." Sec. 722 shews that the question of the adjournment of the hearing is in the discretion of the magistrate. What sec. 715 (1) of the Code says is that the person against whom the complaint is made or the information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf. A similar right is given to the complainant or informant by sub-sec. 2. In this country the point is novel and I may refer to the authorities. In *Reg. v. Biggins* (1862), 5 L.T.N.S. 605, it was held upon a similar enactment, the origin of that found in our Code,

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that it did not touch the discretionary power of the magistrate in the conduct of the trial, and that he was not bound to adjourn to enable the accused to procure counsel, and that, although the accused had the absolute right to the assistance of counsel, if he could obtain it, he was not entitled as of right to an adjournment for the purpose of enabling him to do so. Cockburn, C.J., said: "The intention of the statute was that it should not be in the power of the justices to refuse a party legal assistance upon a summary hearing, when he desired it, but where the matter resolves itself into the question of an adjournment, though it would be proper in the justices to adjourn under the circumstances, yet the statute does not touch his discretionary power on that subject."

The object of the clause was to alter the old law, under which in matters of summary jurisdiction, the parties were not entitled to the assistance of counsel or attorney: Paley, 8th ed., p. 117. "The magistrate," said the Chief Justice, "must have a discretion as to adjourning. The Act does not put the right in such case higher than that of a person tried for felony. Suppose a person in the dock says that he wants counsel or attorney. It may be very proper to postpone his trial, but you cannot say that if the Judge chooses to try him at once he has no jurisdiction."

To the same effect is *Reg. v. Justices of Cambridgeshire* (1880), 44 J.P. 168; and see also Paley, 8th ed., p. 119.

Whatever remedy the defendant may have by way of appeal to the sessions or by way of criminal information against the magistrate, if he adopted an unusual or unreasonable course for the purpose of preventing the defendant from having legal assistance, the refusal to adjourn does not go to his jurisdiction so as to entitle the defendant to have the conviction quashed or to be discharged on *habeas corpus*. The refusal of the right to examine and cross-examine witnesses stands upon a very different footing: *Reg. v. Griffiths* (1886), 54 L.T.N.S. 280.

Appeal dismissed without costs.

MEREDITH, J.A.:—Neither of the grounds upon which the prisoner seeks her discharge from custody in these *habeas corpus* proceedings would be, if substantiated, a good ground for granting such relief in such proceedings. Neither would shew any want

of jurisdiction in the convicting magistrate, but only an irregularity in proceedings in a matter quite within his jurisdiction. Such objections, to the form of an indictment or information, are subjects to be dealt with, in such a case as this, by the Court or magistrate having jurisdiction in the matter, and of amendment, if an amendment be necessary or proper: see sec. 892 of the Criminal Code; and cannot be good grounds for a discharge from custody in such a proceeding as this. So, too, the magistrate's refusal to postpone the trial to enable the accused to obtain the services of counsel in her defence. Obviously there must be cases in which such a refusal would be quite proper—for instance, if the application were made merely for delay—and so the matter is one quite within the jurisdiction of the Court or magistrate trying the case, a matter in the discretion of such Court or magistrate. The subject has been so fully discussed and clearly settled, under legislation the same as that in force here, in the case of *Reg. v. Biggins*, 5 L.T. 605, that it would be superfluous to say more now upon the subject than is sufficient to refer those not familiar with it to that case and what is there said upon it, and to add that the same conclusions have been reached by other eminent Judges in other cases: see *Ex parte Hopwood* (1850), 15 Q.B. 121, and *Reg. v. Justices of Cambridgeshire*, 44 J.P. 168. On neither ground is an accused person without a remedy if any substantial wrong has been done, but that remedy is not a discharge from custody under a writ of *habeas corpus*.

I would dismiss the appeal.

° MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred in the judgment of OSLER, J.A.

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TWIN CITY OIL CO. v. CHRISTIE.

Mar. 29.

*Company—Shares—Application—Allotment—Directors—Delegation of Authority—Withdrawal of Application—By-laws—Number of Directors.*

At a general meeting of the shareholders of the plaintiff company, incorporated under the Ontario Companies Act, it was resolved that a board of three directors should be elected to manage the affairs of the company, and three of the five provisional directors were elected as directors. The three directors met and adopted by-laws, one of which provided that the affairs of the company should be managed by a board of five directors, and another provided for the terms upon which stock subscriptions should be received. About ten months later, a document in the form of an agreement to purchase stock was signed by the plaintiff, and the words "accepted by" written at the foot over the signature of one of the three directors, who had been elected president and general manager; and at a meeting of the directors a resolution was passed giving to the president full power to deal with the defendant's "application." On the following day the president wrote to the defendant notifying him that calls had been made upon the shares subscribed for by him, "which have this day been allotted to you by by-law of this company." Nothing further was done in the way of allotting shares to the defendant, and his name did not appear in the register of shareholders. About two weeks after the receipt of the president's letter, the defendant wrote to the company withdrawing and cancelling his application:—

*Held*, in an action for the amount of calls alleged to be due, that the directors had no power to delegate to the president their authority as to the allotment of shares or their authority to accept the offer of the defendant; there was, therefore, no valid allotment, and the withdrawal was effectual. *Seemle*, that the fact that the by-laws passed by the directors provided for a board of five directors, while a board of only three assumed to manage the affairs of the company, would be a bar to the plaintiffs' success in the action.

THE plaintiff company sued the defendant for a call of 25 per cent. made on 400 shares of the capital stock of the company, of which the defendant was alleged to be the holder, and the defence was that the defendant was not and never became a shareholder. The facts are stated in the judgment.

The action was tried before MEREDITH, C.J.C.P., without a jury, at Berlin, on the 3rd December, 1908.

*E. E. A. DuVernet*, K.C., for the plaintiffs.

*J. A. McAndrew*, for the defendant.

March 29. MEREDITH, C.J.:—Some time before the 28th March, 1908, the defendant signed an undated document in the following words:—

"I, Charles R. Christie, hereby agree to purchase stock in the Twin City Oil Co. Limited to the amount of 400 shares, four hundred shares, at par value of (\$10.00) ten dollars per share, payments

to be made as follows: two hundred shares amounting to \$2,000.00, balance of two hundred shares amounting to two thousand dollars (\$2,000.00) before December 31st, 1908. Charles R. Christie."

And Vernon O. Phillips on the same day signed under the words "accepted by" at the foot of this document, adding "M'g'r" after his name.

On the 28th March, 1908, Phillips, as president and manager of the company, wrote a letter to the defendant in these words:—

"Sir: I beg to give you notice that the directors of the Twin City Oil Company Limited have made three calls upon the four hundred shares subscribed for by you in the capital stock of this company, and which have this day been allotted to you by by-law of this company as follows:—

"Twenty-five per cent. thereof, being the sum of one thousand dollars, on the first day of May, 1908, another twenty-five per cent. thereof, being the sum of one thousand dollars, on the first day of June, 1908, and the balance of fifty per cent. thereof, being two thousand dollars, on the thirty-first day of December, 1908, and that the said sums will be payable to Henrietta M. Phillips, the treasurer of this company, at the company's office in the town of Berlin on the respective days hereinbefore set forth."

On the 10th April following, the defendant wrote a letter to the company withdrawing and cancelling his application for 400 shares of the capital stock of the company.

The sole question for decision is, whether or not there had been, before this last letter was received by the plaintiffs, an allotment of the shares of which the defendant had had notice so as to bind him.

The company was incorporated under the Ontario Companies Act, by letters patent dated the 3rd day of May, 1907, and the provisional directors named in the letters patent are Vernon Osman Phillips, Joshua Alfred Phillips, Richard Richmond, Christopher Nicholas Huestis, and Elizabeth Ann Phillips.

A general meeting of the shareholders was held on the 25th May, 1907, at which it was resolved that a board of three directors should be elected to manage the affairs of the company, and Vernon Osman Phillips, Christopher Nicholas Huestis, and Richard Richmond, three of the provisional directors, were elected as directors.

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On the same day a meeting of the directors was held, at which V. O. Phillips was elected president and general manager, Huestis as vice-president, and Richmond as secretary, and by-laws were also adopted.

By sec. 7 of these by-laws it is provided that the affairs of the company shall be managed by a board of five directors, of whom three shall form a quorum; and by sec. 27 it is provided that stock subscriptions shall be received on the following terms: 25 per cent. payable on allotment, and 25 per cent. on the first of each month thereafter until fully paid; and that no stock certificate shall issue until the stock shall be fully paid; but that the directors shall have the right to change these terms when approved of by a majority of the board, or to accept payment in full for stock subscriptions when deemed best in the interest of the company.

At a meeting of the directors held on the 27th March, 1908, a resolution was passed giving to the president full power to deal with the defendant's "application for purchase of stock in the Twin City Oil Co. Limited," and it was apparently under the authority of this resolution that the letter of the following day was written.

Nothing further was done in the way of allotting shares to the defendant, and his name does not appear in the register of shareholders.

Upon this state of facts, I am of opinion that there was not a valid allotment of shares to the defendant, that he never became a shareholder, and that his withdrawal of his application was effectual.

The directors had, I think, no power to delegate to the president their authority as to the allotment of shares or to accept the offer of the defendant for the shares for which he applied: Lindley on Companies, 6th ed., p. 206, note q, and cases there cited; Buckley on Companies, 8th ed., p. 84; *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100.

Apart from this objection, which is, in my opinion, fatal to the claim of the plaintiffs, the fact that the by-laws passed on the 25th May, 1907, provide that the affairs of the company should be managed by a board of five directors, and that a board consisting of only three directors assumed to manage its affairs, would be a formidable difficulty in the way of success.

I may point out that the directors on the 18th April, 1908,

were apparently aware that no proper allotment of the shares to the defendant had been made, for on that day a minute in the following terms is found in the minute book of the board: "The president stated that it was necessary, before taking proceedings against C. R. Christie, that a by-law be passed allotting stock to him. A by-law for that purpose was passed and read a first, second, and third time and finally passed as special by-law No. 2, and the company's seal affixed thereto, with the signature of the president and secretary."

The first section of the by-law referred to in this minute is as follows: "1. That four hundred shares of the capital stock of the Twin City Oil Company Limited are hereby allotted to Charles R. Christie, of the city of Toronto, in the county of York, manufacturer."

An allotment at this date was, of course, ineffectual, as the application for the shares had been withdrawn more than a week before it was made.

The result is that, in my opinion, the action fails, and must be dismissed, but I dismiss it without costs, as the defendant failed to prove the misrepresentations which he alleged were made to him to induce him to become a shareholder.

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[IN CHAMBERS.]

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RE WILSON V. DURHAM ET AL.

Mar. 30.

*Division Courts—Order for Committal of Judgment Debtor—Power to Rescind—  
Division Courts Act, sec. 247—Mandamus.*

A Judge of a division court has no power, under any of the provisions of the Division Courts Act, or otherwise, to rescind an order made by him, under sec. 247 of the Act, committing a judgment debtor to gaol, on the ground that it appeared to the Judge that the debtor had incurred the debt for which judgment had been recovered, by means of fraud.

A mandamus to the Judge to hear an application to rescind was refused.

MOTION by the defendant Stickney for a mandamus to the Judge of the 1st division court in the county of Oxford to hear and consider an application made to him by the applicant Stickney to rescind an order made by the Judge on the 9th February, 1909, by which he directed that the applicant should be committed to the common gaol of the county of Oxford for twenty days. The facts are stated in the judgment.

The application was heard by MEREDITH, C.J.C.P., in Chambers, on the 9th March, 1909.

*T. L. Monahan*, for the applicant.

*C. A. Moss*, for the plaintiff, the respondent.

March 30. MEREDITH, C.J.:—The order was made under sec. 247 of the Division Courts Act, and on the ground that it appeared to the Judge that the applicant had incurred the debt for which judgment had been recovered, by means of fraud.

What the applicant is seeking is a re-trial of a matter upon which there has been an adjudication, and the view of the learned Judge when the application was made to him was that he had no jurisdiction to hear it or to rescind the order which had been made.

The provisions as to new trial are contained in sec. 152, and have relation only to the trial of an action, and there is no provision for a re-trial or a new trial where a defendant has been summoned under the provisions of sec. 243 and an order for his commitment has been made under sec. 247.

Nor is there any provision enabling the Judge to rescind an order made by him under sec. 247.

Section 251, which provides that the Judge shall order a person imprisoned under the Act to be discharged out of custody, applies

only when he "has satisfied the debt or demand or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining the order and all subsequent costs."

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Section 252 is also inapplicable; the power to rescind or alter an order conferred by it extends only to an order for payment previously made, and not to the order of commitment.

It is unnecessary to consider whether the Judge of a division court has inherent jurisdiction to rescind an order made by him which has been made *per incuriam* or obtained by fraud, for no such case is made by the applicant.

Even in the case of an *ex parte* order made by a Judge of the High Court, it has been held that after it has been acted upon the Judge has no power to rescind it: *McNabb v. Oppenheimer* (1885), 11 P.R. 214, and other cases cited in Holmsted & Langton's Judicature Act, 3rd ed., p. 366; and it was in consequence of these decisions that Con. Rule 358 was passed.

If there is no inherent jurisdiction to rescind an *ex parte* order, *à fortiori* there can be none to rescind an order made in the presence of the parties or after notice to them.

If *Shaw v. Nickerson* (1850), 7 U.C.R. 541, is to be understood as deciding otherwise, and I think it is not, it is opposed to the present practice, and must be taken to be no longer a binding authority.

*Re Nilick v. Marks* (1900), 31 O.R. 677, is, I think, conclusive against the existence of the jurisdiction which the Court is asked to require the Judge to exercise.

I therefore refuse the application without costs.

E. B. B.



[MEREDITH, C.J.C.P.]

1909

## RE TAYLOR AND VILLAGE OF BELLE RIVER.

April 2.

*Way—Jurisdiction of Municipal Council—Closing Part of Highway Extending into other Municipalities—Consolidated Municipal Act, 1903, sec. 637—“Wholly within the Jurisdiction of the Council.”*

By sec. 637 of the Consolidated Municipal Act, 1903, the council of every county, township, city, town and village may pass by-laws, (1) for . . . stopping up roads . . . wholly within the jurisdiction of the council:”—*Held*, that the word “wholly” is used with reference not to the locality of the road, but to the jurisdiction of the council over it; and the council of a municipality has jurisdiction to pass a by-law closing part of a continuous highway passing through that municipality and extending into other municipalities.

*In re Falle and Township of Tilsonburg* (1873), 23 C.P. 167, followed.

*Hewison v. Township of Pembroke* (1884), 6 O.R. 170, commented on.

THIS was a motion by Cecilia Taylor, a ratepayer and land-owner of the village of Belle River, to quash by-law number 6 of the council of that municipality, passed on the 27th August, 1908, and intituled “A by-law to close part of the Tecumseh road in the village of Belle River.” The facts and arguments are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 10th March, 1909.

*A. H. Clarke*, K.C., for the applicant.

*F. E. Hodgins*, K.C., for the respondents.

April 2. MEREDITH, C.J.:—The only question not disposed of upon the argument was that as to the jurisdiction of the council to close part of a continuous highway, extending into other municipalities, which the Tecumseh road is.

The section of the Consolidated Municipal Act, 1903, under the authority of which the by-law was passed, is sec. 637, which reads as follows:—

“637. The council of every county, township, city, town and village may pass by-laws—

“1. For . . . stopping up roads, streets, squares, alleys, lands, bridges, or other public communications wholly within the jurisdiction of the council.”

It was contended by Mr. Clarke that the use of the word “wholly,” which was introduced into paragraph 1 by 3 Edw. VII.

ch. 18, sec. 134, especially when read in connection with sec. 658, which confers on county council's power to pass by-laws for stopping up original allowances for roads and in terms provides for the stopping up of the road "or any part thereof," has the effect of limiting the powers conferred by paragraph 1 of sec. 637 to the stopping up of the whole of a road, and then only a road lying wholly within the municipality.

I am unable to agree with this contention. The word "wholly" is used, as I read paragraph 1 of sec. 637, with reference not to the locality of the road, but to the jurisdiction of the council over it, and that there is jurisdiction to close part of a road has been settled by a decision binding on me. It was so decided in *In re Falle and Town of Tilsonburg* (1873), 23 C.P. 167, Gwynne, J. who delivered the judgment of the Court, saying: "We have no doubt as to the jurisdiction of the town municipality to close the piece of road in question, providing, as they appear to have done, other roads in substitution . . . : " p. 171. Section 320 in the Act under consideration in that case (29 & 30 Vict. ch. 51) is substantially the same as paragraph 1 of sec. 637 of the Act of 1903, omitting the word "wholly," and the section of that Act which corresponds with sec. 658 (sec. 344) contains the words "or parts thereof" where the words "or any part thereof" are used in sec. 658; so that an argument based on the provisions of sec. 344 was as open to the applicant in that case as is the argument of the applicant based on the provisions of sec. 658 in this case.

It is true that in *Hewison v. Township of Pembroke* (1884), 6 O.R. 170, Rose, J., said: "As the road runs from Ottawa to Pembroke, and is, therefore, not within the limits of the municipality, I am unable to satisfy myself that the township council has any power to close or divert it at all. And it may be that there is no power given to any municipal body to interfere with a section of a road running through more than one municipality. Section 524 (565 of 1883) provides for a county council 'opening . . . stopping up roads . . . running or being within one or more townships.' 'One or more' possibly should be read 'more than one.' Unless this section gives power to stop up a section of a continuous road running, say, through more than one county, no express language can be found giving such power.

Meredith, C.J.

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RE TAYLOR  
AND  
VILLAGE OF  
BELLE RIVER.

Meredith, C.J. It would seem anomalous that a section of a road such as the  
1909 Kingston road, running from Kingston to London under various  
RE TAYLOR names, and possibly farther both east and west, could be closed  
AND or diverted by a township council. If such power has not been  
VILLAGE OF given to township councils, then this by-law is *ultra vires* of the  
BELLE RIVER. council of Pembroke. I do not find it necessary to determine  
this point. Had I found it necessary I would have requested  
counsel to further argue it, as, it being suggested to counsel on  
the argument, they were unable to argue it fully without con-  
sideration. Had it been fully considered by them, probably I  
should not feel any difficulty as to it, judging from the very care-  
ful and finished arguments addressed to me on the other points  
of the case:" pp. 171, 172.

It is to be observed that the *Falle* case was not cited and is  
not referred to, and, in any case, what was said by Rose, J., would  
not justify me in refusing to follow that case.

*Re Platt and City of Toronto* (1872), 33 U.C.R. 53, may also  
be referred to.

The part of the Tecumseh road which lies within Belle River  
is, I doubt not, vested in the corporation of that municipality  
by sec. 601, and it is wholly under the jurisdiction of its council,  
because no other council is given jurisdiction over it, either alone  
or concurrently with the council of Belle River.

If the contention of the applicant were to prevail, it would seem  
to follow that the duties imposed on corporations as to the repair  
of highways would not apply to the part of the Tecumseh road  
which lies within the municipality of Belle River, and there would  
be no power in its council to pass by-laws for preserving, improving,  
or repairing it.

A construction which would lead to such a result ought not  
to be given to the enactment, unless its language admits of none  
other, which, in my opinion, is not the case.

The motion is dismissed with costs.

E. B. B.

## [DIVISIONAL COURT.]

SAWYER-MASSEY Co. v. HODGSON ET UX.

D. C.

1909

*Husband and Wife—Co-sureties for Debt of Stranger—Liability of Wife—  
Absence of Fraud—Findings of Trial Judge—Demeanour of Witnesses—  
Appeal.*

April 19.

A married woman, when contracting otherwise than for the benefit of her husband, has all the capacity of a *feme sole* to bind her separate estate, and there can be no ground for presuming that the husband abused the confidence of his wife by exercising undue marital influence for the benefit of a stranger.

*Cox v. Adams* (1904), 35 S.C.R. 393, distinguished.

And, in the circumstances of this case, where the defendants, husband and wife, became sureties for the debt of a third person, and it was found by the trial Judge that the wife became co-surety with full knowledge of the nature of the obligation which she undertook and without anything in the nature of fraud, misrepresentation, or undue influence, she was *held* liable to the creditors, the plaintiffs, no circumstances being proved which would relieve the principal debtor from liability.

There was evidence that threats were used to induce the wife to guarantee the debt, but the trial Judge found, upon consideration of the conduct and demeanour of the witnesses, that no such threats were made:—

*Held*, that the Court could not, upon conflicting evidence, reverse this finding. Judgment of Riddell, J., affirmed.

AN appeal by the defendants from the judgment of Riddell, J., at the trial, in favour of the plaintiffs, in an action upon promissory notes made by the defendants, as guarantors of the price of a threshing machine and outfit purchased from the plaintiffs by one Lawton, the defendant Jane Hodgson having also executed an agreement charging certain land belonging to her with the amount of the notes.

The appeal was heard by a Divisional Court composed of MULOCK, C.J., ANGLIN and CLUTE, JJ., on the 7th December, 1908.

*Featherston Aylesworth*, for the defendants, contended that the defendant Jane Hodgson, the wife of the other defendant, was, at any rate, not liable, her execution of the notes and agreement having been procured, at the request of her husband, by threats made by an agent of the plaintiffs, and without her having independent advice or opportunity for advice, and without knowledge of what she was doing; that there was evidence of fraud, but it was not essential to shew fraud. He referred to *Cox v. Adams* (1904), 35 S.C.R. 393; *Stuart v. Bank of Montreal* (1908), 17 O.L.R. 436; *Smith v. Kay* (1859), 7 H.L.C. 750.



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*Kirwan Martin*, for the plaintiffs, contended that the evidence shewed conclusively that the defendant Jane Hodgson knew what she was doing; he discussed the cases above cited.

*Aylesworth*, in reply.

April 19. The judgment of the Court was delivered by ANGLIN, J.:—The defendants, husband and wife, appeal from the judgment of Riddell, J., holding them liable to the plaintiffs as guarantors of the indebtedness of one Lawton. Lawton is not a party to the action, and counsel for the appellants confined his argument to a plea for the relief of Mrs. Hodgson.

Upon the findings of the trial Judge, the defendant Jane Hodgson became co-surety with her husband with full knowledge of the nature of the obligation which she undertook and without anything in the nature of fraud, misrepresentation, duress, or undue influence. The learned Judge further found that no circumstances were proved which would relieve the principal debtor from liability.

From a perusal of the evidence, I am not at all certain that I would have reached the conclusion that the plaintiffs' agent, when demanding that Mrs. Hodgson, as registered owner of the farm occupied by herself and her husband, should guarantee Lawton's debt, did not more than hint at certain unpleasant consequences to her husband should she refuse. But the trial Judge has found that no such threats were made, expressly stating, at least twice, that he bases his finding upon "consideration of the witnesses whose conduct and demeanour I see in the witness-box." With our hands thus tied, we cannot, upon conflicting evidence, reverse this finding: *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, 326.

Counsel for the appellants relied upon *Cox v. Adams*, 35 S.C.R. 393, as authority establishing that Mrs. Hodgson should not be held liable because she had not the benefit of independent advice before entering into the obligation to the plaintiffs. The judgment of this Court was reserved pending the disposition in the Supreme Court of *Stuart v. Bank of Montreal*, 17 O.L.R. 436, in which it was anticipated that the principle of the decision in *Cox v. Adams* might be reconsidered. Judgment has recently been rendered by the Supreme Court, following *Cox v. Adams*, allowing

Mrs. Stuart's appeal, and holding her not liable, solely because she had not independent advice.

But in the *Stuart* case, as in *Cox v. Adams*, the *feme covert* had entered into the impeached transaction for the benefit of her husband. This fact was held to raise a presumption of undue influence, which could only be rebutted by proof that she had, in fact, had independent advice. In the present case, although it was suggested that Hodgson had some personal interest in the threshing machine bought by Lawton, the evidence establishes, and the trial Judge has declared that it is perfectly plain that Hodgson was merely a surety for Lawton, and had no proprietary or beneficial interest in the transaction.

In the absence of any such interest in the husband, the ground upon which the presumption of undue influence was based in *Cox v. Adams* and *Stuart v. Bank of Montreal* is non-existent in this case. Not only has a married woman, when contracting otherwise than for the benefit of her husband, all the capacity of a *feme sole* to bind her separate estate, but there can be no ground for presuming that the husband abused the confidence of his wife by exercising undue marital influence for the benefit of a stranger.

Upon the findings of the learned trial Judge, with which we are not in a position to interfere, the liability of Mrs. Hodgson is established. The appeal, therefore, fails and must be dismissed with costs.

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E. B. B.

## [IN CHAMBERS.]

1909

ST. MARY'S AND WESTERN ONTARIO R.W. CO. v. WEBB.

April 13.

*Venue—Naming place of trial in writ of Summons—Nullity*

The mention of a place of trial in a writ of summons not specially indorsed has no binding effect, and the plaintiff is free to name another in his statement of claim.

THIS was an appeal from the Master in Chambers under the circumstances mentioned in the judgment, and was argued before LATCHFORD, J., on April 2nd, 1909.

*C. A. Moss*, for plaintiff.

*W. R. Wadsworth*, for defendant.

April 13. LATCHFORD, J.:—Appeal from the order of the Master directing that the plaintiff amend his statement of claim by striking out the words “the city of Brantford” as the place of trial of this action, and substituting therefor the words “the city of Stratford.”

In the writ of summons, which was not specially indorsed under rule 138, sub-sec. 2, the plaintiff named Stratford as the place of trial. The mention of any place of trial in a writ not specially indorsed has, in my opinion, no binding effect. It is not done in compliance with any rule. On the other hand, rule 529 (a) prescribes that the plaintiff shall, in his statement of claim, name the county town in which he proposes that the action shall be tried. The plaintiff in this case so named the city of Brantford. It is not suggested that any inconvenience will result to the defendant by the selection of Brantford as the place of trial. That selection in the statement of claim, deliberately and compulsorily made, cannot, I think, be affected by the naming of Brantford in the writ.

It would be otherwise if the writ were specially indorsed: *Segsworth v. McKinnon* (1900), 19 P.R. 178. The appeal is allowed with costs to plaintiff in any event of the action.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

RONSON V. CANADIAN PACIFIC R.W. Co.

C. A.

1909

April 5.

*Fatal Accidents Act—Excessive damages—Death of wife and mother—R.S.O. 1897, ch. 166.*

In an action under the Fatal Accidents Act, R.S.O. 1897, ch. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded \$3,325, apportioning \$325 to the executors of her husband who survived her, \$800 to a daughter 36 years of age, \$700 to a son 27 years of age, and \$1,500 to a son 21 years of age.

*Held*, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment.

THIS was an appeal by the defendants from the judgment at the trial of this action at St. Thomas, on April 22nd, 1908, before His Honour Judge Colter, Judge of the county court of the county of Elgin, sitting for and at the request of Magee, J., assigned to take the assizes for the county of Elgin.

The action was one of negligence, claiming damages for injuries sustained by Eleanor Ronson, deceased, wife of James Ronson, since deceased, and the defendants admitted liabilities for any damages which should be legally proved against them. By the judgment appealed from the defendants were ordered to pay to the plaintiffs the sum of \$3,325, apportioned by the jury as follows: To the executors of James Ronson, \$325; to Sarah Moffatt, aged 36, eldest daughter of deceased, \$800; to Charles L. Ronson, aged 27, eldest son of deceased, \$700; to George Ronson, aged 21, also a son of deceased, \$1,500.

The appeal was argued on February 3rd, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

G. T. Blackstock, K.C., and Angus MacMurchy, K.C., for the defendants, appellants, contended that the damages granted were altogether excessive in view of the circumstances of the case, which are sufficiently set out in the judgment below: *Rowley v. London and North-Western R.W. Co.* (1873), L.R. 8 Exch., p. 221; that the damages had been assessed according to the mortality tables, which was not proper: *Central Vermont R.W. Co. v. Franchere* (1904), 35 S.C.R. 68; *Vicksburg and Meridian R.R. Co. v. Putman* (1886), 118 U.S. 545, 556; that whenever a wrong measure of damages is given to a jury, a new trial should be granted: *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250.



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C. A. Masten, K.C., for the respondents, as to *consortii damnum* referred to the *St. Lawrence and Ottawa R.W. Co. v. Lett* (1885), 11 S.C.R. 422; and contended that the executors of James Ronson had a right to recover; that the proper rule was laid down by Brett, L.J., in *Phillips v. London and South-Western R.W. Co.* (1879), 5 C.P.D. 280, at pp. 289-290; *Johnston v. London and North-Eastern R.W. Co.*, *supra*. He also referred to *Hetherington v. The North-Eastern R.W. Co.* (1882), L.R. 9 Q.B. 160; *Renwick v. Galt, Preston and Hespeler Street R.W. Co.* (1901), 6 O.W.R. 413; *Stephens v. Toronto R.W. Co.* (1905), 6 O.W.R. 657.

Angus MacMurphy, in reply.

April 5. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before the Judge of the county court of the county of Elgin, sitting for Magee, J., and a jury, in favour of the plaintiffs.

The action was brought to recover damages for the death of Eleanor Ronson through the negligent operation of an engine and train by the defendants upon their railway.

Eleanor Ronson was the wife of James Ronson, and the plaintiffs, Charles L. Ronson, George E. Ronson and Sarah E. Moffatt are their children. The plaintiff Edgar Sandham is the executor of the last will of Eleanor Ronson, and the plaintiffs Charles L. Ronson and George E. Ronson are the executors of the last will of their father, who died after the accident and before action.

The accident occurred on September 3rd, 1907, but Eleanor Ronson survived until November 12th, 1907. The defendants at the trial admitted negligence. The jury assessed the damages at the following sums: to the executors of James Ronson, \$325; to Sarah Moffatt, the daughter, \$800; to Charles L. Ronson, a son, \$700; and to George Ronson, a son, \$1,500.

James Ronson was a farmer, living with Eleanor Ronson his wife, upon lands apparently owned by him in the township of Middleton, in the county of Norfolk.

Eleanor Ronson, according to the evidence, was a capable managing sort of woman, but there is no evidence that she had any considerable property or means of her own. What she managed, and no doubt managed very well, was, as far as appears, wholly the property of her husband. She was evidently very fond of her

children and of helping them, but always apparently out of her husband's property. In addition she was always ready with competent advice and with active help in time of sickness or other stress.

The eldest child was Sarah. She was 36 years of age, and had been married and away from her parents' home for twelve years. The next was Charles. His age was 27 years. He, too, had been married for some years, and was doing for himself on land which his father had sold to him at a reduced price, helping him also with his live stock. The youngest was George, 21 years, who resided at home, and who, after the accident, and before his mother's death, also married and went to live on land supplied by his father.

The damages recoverable under R.S.O. 1897, ch. 166, are entirely pecuniary in their nature. The plaintiffs must shew by reasonable evidence that but for the negligent act of the defendant they were likely to have gained the amount of the damages which they seek to compel the defendants to pay. And they must shew not merely willingness on the part of the deceased, but ability—that is, the means, to do that which was not done because of the death. These children were all beyond the age when they required a mother's care in the ordinary sense, or, with spouses of their own, were very likely to be guided by a mother's advice.

The mother's own property was of so small an amount as to be quite insignificant as a source of pecuniary assistance to her children, and the personal services of a woman 62 years of age, as nurse or as a helper in the field, could in any event not have been reasonably expected to continue very long. There is not a particle of evidence (if it is of any consequence) that in helping the children out of her husband's property she was not acting simply as his agent, and with his entire concurrence. And in the absence of evidence, that is, I think, the proper presumption. So that on every ground and however viewed, the large damages assessed by the jury are not based upon any proper view of the facts, and are at least grossly excessive.

I say "at least," because I have had, and still have, considerable doubt, in the case of some, if not of all the children, whether there was any reasonable evidence for the jury of pecuniary loss in any proper sense. But upon the whole I think it will be safer to permit the case to go to a new assessment, leaving this question entirely open.

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The judgment in favour of the executors of James Ronson was not, I think, successfully or even seriously attacked, and may stand, and the appeal as to it be dismissed with costs.

The appeal should otherwise be allowed, and with costs, for the plaintiffs fail in that which was seriously in contention.

The costs of the last trial, except as to the plaintiffs the executors, should, under the circumstances, be reserved to be dealt with by the trial Judge.

A. H. F. L.

[DIVISIONAL COURT.]

GORDON V. MATTHEWS.

D. C.  
1908  
Dec. 17.  
1909  
March 8.

*Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Separate Liability of Partner—Right of Creditor of Partnership to Rank on Estate of Partner with Individual Creditors—R.S.O. 1897, ch. 147, sec. 7—Election.*

A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm by the plaintiff:—

*Held*, that the plaintiff was entitled to rank upon the insolvent estate of the partner for the amount of the unpaid note, ratably with the individual creditors of the partner.

Construction of sec. 7 of the Assignments Act, R.S.O. 1897, ch. 147.

Decision of MACMAHON, J., in *Frost and Wood Co. v. Stoddart* (1908), 12 O.W.R. 1133, observed upon.

The plaintiff having elected, before accepting a dividend from the insolvent estate of the partnership, to pursue his remedy against the estate of the partner, the question whether, under the statute, it was necessary to elect, did not arise.

Judgment of MULOCK, C.J.Ex.D., reversed.

ACTION for a declaration that the plaintiff is entitled to rank as a creditor, ratably with other creditors, upon the estate of Duncan L. Myers in the hands of the defendant, as assignee of Myers for the benefit of his creditors. The facts appear in the judgments.

The action was tried before MULOCK, C.J.Ex.D., without a jury, on the 30th September, 1908.

*R. S. Robertson*, for the plaintiff.

*G. C. Gibbons*, K.C., for the defendant.

December 17, 1908. MULOCK, C.J.:—In this action the plaintiff seeks a declaration that, as a creditor of one Duncan L. Myers, he is entitled to rank upon Myers's estate in the hands of the de-

fendant, his assignee, ratably with Myers's other creditors. The debt due to the plaintiff is in respect of certain lumber sold by the plaintiff to the Stratford Mill and Lumber Company, a partnership, the members of which were Duncan L. Myers and one Jacobs.

In respect of this indebtedness the plaintiff holds the various notes and cheques mentioned in his statement of claim, the notes being the joint and several notes of the company, Myers, and Jacobs, the cheques being drawn by Myers only. Myers made an assignment for the benefit of his creditors to the defendant, Matthews, and the company assigned for the benefit of its creditors to the sheriff. The plaintiff filed with the sheriff his claim against the company, verifying the same by his affidavit, wherein he swore that the company was justly and truly indebted to him in respect of the said notes and cheques in the sum of \$1,198.50, and that he held as security therefor certain lumber and shingles of the value of about \$250. The sheriff sold all the assets of the firm, realising therefor the sum of \$3,738.12, and, after deducting therefrom the amount of preferential liens thereon, there remained the sum of about \$700, which the sheriff is of opinion will be eaten up with charges and expenses, thus leaving nothing for distribution amongst the firm's creditors. Under these circumstances, the plaintiff claims to be entitled to rank upon the estate of the said Duncan L. Myers with his other creditors.

The plaintiff's evidence shews that the lumber was sold to the partnership composed of Myers and Jacobs, and that Myers said he would "see it paid." Accordingly he gave his own note for the first account. Further sales appear to have taken place whereby subsequent indebtedness arose; and in respect thereof, and of the balance owing on the first sale, notes signed by the company, Myers, and Jacobs, were given to the plaintiff. If the debt was not that of the partnership, there appears no explanation for the company signing the notes. There is no evidence to support the suggestion that the sale was made to the company, Myers, and Jacobs, as joint purchasers. On the contrary, it shews that the company purchased the goods; that they were delivered to the company, Myers, a third person (an individual member of the company); promising to be answerable for the company's indebtedness. The debt was contracted by the company in its own name and on its own behalf, and was in fact the debt of the company.

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The case, therefore, comes within the provisions of sec. 7 of R.S.O. 1897, ch. 147: "If any assignor or assignors executing an assignment under this Act, for the general benefit of his or their creditors owes or owe, debts both individually and as a member of a co-partnership, or as a member of different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full."

Here the debt having been contracted in respect of the partnership, the plaintiff is entitled to rank upon Myers's individual estate only after his individual creditors have been paid in full. This right is secured to him by the statute, and need not be provided for in this judgment, which will be to the effect that the plaintiff is not entitled to rank upon Myers's estate with the other creditors thereof, and that this action is dismissed with costs.

The plaintiff appealed to a Divisional Court, and his appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 3rd March, 1909.

*R. S. Robertson*, for the plaintiff. The right of a creditor of a partnership to rank on the individual insolvent estate of a partner equally with the creditors of the latter depends upon the construction of R.S.O. 1897, ch. 147, sec. 7. The plaintiff has the notes of the partnership and the joint and several notes of the partners. It is not the case of a principal debtor and a surety. See *Lakeman v. Mounstephen* (1874), L.R. 7 H.L. 17. No matter who got the benefit of the contract, if there is a joint and several obligation, the creditor may at least elect, and the plaintiff has elected his remedy against the estate of Myers. *Frost and Wood Co. v. Stoddart* (1908), 12 O.W.R. 1133, a decision of MacMahon, J., is in my way, but it is not in accord with decisions binding on this Court: *Re Chaffey* (1870), 30 U.C.R. 64; *Re Walker* (1880), 6 A.R. 169, 172. See also *Ex p. Bevan* (1803), 9 Ves. 223; *Ex p. Clowes* (1789), 2 Bro. C.C. 595; Lindley on Partnership, 5th ed., pp. 702, 743; *Ex p. Harding* (1879), 12 Ch.D. 557; *Ex p. Dear* (1876), 1 Ch.D. 514; *Ex p. Ackerman* (1808), 14 Ves. 604; *Ex p. Bentley* (1790), 2 Cox Eq. 218; *Ex p. Thornton* (1858), 3 De G. & J. 454. It is suggested that the plaintiff by acting as inspector of

the partnership estate made an election—but an inspector need not be a creditor. The doctrine of election does not apply to cases under our statute: see sec. 6. Section 3 protects only assignments made for the purpose of paying creditors ratably.

*G. C. Gibbons*, K.C., for the defendant. *Re Chaffey*, 30 U.C.R. 64, deals with a special provision in the Act of 1869. Section 7 of ch. 147 takes away the right of election. *In re Wilson* (1877), 2 A.R. 151, was decided under the Act of 1875. As to election, see Deacon's Law of Bankruptcy, p. 841. Patterson, J.A., in *Re Walker*, 6 A.R. at p. 172, discusses the English rule. I rely on the construction given to the statute by the trial Judge in this case, notwithstanding *Re Chaffey*. The procedure in bankruptcy cases in England is by petition. See *Ex p. Dixon* (1841), 2 Mont. D. & DeG. 312.

*Robertson*, in reply.

March 8. BRITTON, J.:—The plaintiff's action is for a declaration that he is entitled to rank upon the estate of Duncan L. Myers for an amount set out in the statement of claim.

Duncan L. Myers is insolvent, and the defendant is his assignee. Myers was a member of the firm of the Stratford Mill and Lumber Company, and that company is insolvent, and has made an assignment for the benefit of its creditors. This matter is now to be dealt with wholly in regard to Myers and his estate. He was a member of the partnership named, and therefore owed debts as such member. It was established that in regard to the plaintiff's claim Myers had become individually liable; and so, within the exact words of sec. 7 of R.S.O. 1897, ch. 147, the debt for which ranking is asked was contracted by him individually. It was established then that he was insolvent and owed debts both individually and as a member of the co-partnership to the plaintiff. The plaintiff was then at liberty to look to either estate.

He could look to the partnership estate for the debt as contracted by that partnership, or he could look to the estate of D. L. Myers upon the debt contracted by D. L. Myers individually. He must, under the terms of the Act, make his election, and, having elected to prove against one, he cannot rank upon the other until after all the creditors of that other have been paid in full. That is what the Act says, and the case of *Re Chaffey*, 30 U.C.R. 64, seem expressly in point. That case was decided in 1870, upon

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the construction placed upon sec. 7 of the Act of 1864 (27 & 28 Vict. ch. 17), which is, except in using the word "assignor" instead of "insolvent," exactly the same as sec. 7 of R.S.O. 1897, ch. 147. The plaintiff presented his claim to the assignee of the partnership estate. He was at liberty to withdraw that claim so long as he did so before any dividend sheet was prepared, and he could formally elect, as apparently he did, to prove against the estate of Myers for what in law must be regarded as the individual debt of Myers.

For these reasons, with great respect, I think the appeal should be allowed with costs, and there should be judgment for the plaintiff in the action for a declaration as asked, with costs.

RIDDELL, J.:—The position of a partner in respect of liability for the debts of a partnership is quite clear: "Every partner is liable jointly with the other partners . . . for all debts and obligations of the firm incurred while he is partner:" Partnership Act, 1890, sec. 9 (Imp.) He owes these debts quite as much as he owes debts incurred by himself separately.

When our statute R.S.O. 1897, ch. 147, sec. 7, says, "If any assignor or assignors . . . owes or owe debts individually and as a member of a copartnership," the case is contemplated of a person who is a member of a partnership incurring individual debts while the partnership incurs other debts which he owes as a member of the partnership under the rule above set out. The statute is introduced to make a statutory provision that the assets of the partnership are not to be used to pay the individual debts unless and until the partnership debts are provided for, and *vice versa*. This is the rule which has long prevailed in England, and is laid down clearly by Lord King in *Ex p. Cook* (1728), 2 P.Wms. 500, who states the law as settled. It had been so decided by Lord Chancellor Harcourt in *Ex p. Crowder* (1715), 2 Vern. 706; and has not ever been varied in cases of bankruptcy.

And the estate to which recourse may be had without valid objection is, under the statute, the estate "by which the debt was contracted;" *i.e.*, we must first determine whether the debt was contracted by partnership or by partner individually; and then the debt of the partnership is entitled to share ratably in the partnership estate, the debt of the partner individually in the estate of the individual partner. The

expression is, "the estates by which the debts . . . were contracted;" not "the estates for the benefit or advantage of which the debts . . . were contracted." It makes no difference who may benefit by the transaction resulting in the debt—the whole question is, "who incurred the debt?"

For example, if a partner wished to furnish a house, and the tradesman made the agreement with the firm that the firm should pay and the individual should not, the debt would not be one contracted "by" the individual, though for him and for his sole benefit; if a dealer were to sell to the firm, but with the stipulation that he was to be paid by an individual member of the firm, and this were agreed to, the debt would not be a debt of the firm, but that of the individual partner.

And if both firm and individual agreed to pay, it would make no difference for whose advantage the debt was contracted; the debt would be incurred by both firm and individual. In that case I am unable to see why a claim might not be made against both estates. If the firm A. & Co. have creditors B., C., and D., and the partner A. have creditors D., E., and F.; D. can claim against both estates if the claims against the firm and the individual are not the same—why should he not claim if the amount be the same? He has required and obtained the security of two debtors instead of one—why should he not have the advantage of his precaution?

The rule laid down by the Chief Justice whose judgment is appealed from would operate to prevent a creditor who knows that a firm is shaky but one of its members is in good standing, and insists on getting the security of the man who is worth something, from being in any better position than the creditor who was content with the firm's paper.

Whether it be necessary to elect under our statute may be left open for future consideration: the question does not arise here: the plaintiff has elected within the time which the authorities lay down, *i.e.*, before accepting a dividend: *Ex p. Bentley*, 2 Cox Eq. 218.

The foregoing is, I think, the result upon principle. But authority is not wanting.

*In re Chaffey*, 30 U.C.R. 64, is a decision upon (1864) 27 & 28 Vict. (Can.) ch. 17, sec. 5 (7), of which the wording is not dissimilar

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to the present sec. 7. It was there decided that where a member of a partnership indorsed a note of the partnership payable to himself, the indorsee could treat the individual partner as having incurred a separate liability by his indorsement distinct from his joint liability as maker, and might claim upon either estate. It was held that he must elect; but, as I have said, that question does not arise in this case.

With the present opinion accords the opinion of the Divisional Court in *Frost and Wood Co. v. Stoddard*, 12 O.W.R. 688, upon directing a new trial. The judgment upon the new trial (MacMahon, J., *ib.* 1133) indicates that the real defect in the admissions, namely, that it did not appear whether the notes, etc., in the hands of the creditors had been accepted as in satisfaction of the former so as to annul the effect of the former, was not brought to the attention of the learned trial Judge. If, and so far as, the judgment of my learned brother MacMahon is opposed to the present judgment, it should be overruled.

The appeal should be allowed with costs here and below, and the plaintiff declared entitled to claim for a debt of \$893.26 against the estate of Myers.

FALCONBRIDGE, C.J.:—I agree that the appeal should be allowed with costs here and below.

E. B. B.

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## [DIVISIONAL COURT.]

## REX V. BUTTERFIELD.

D. C.

1909

Feb. 17.  
Mch. 1.

*Justice of the Peace—Conviction for Selling Intoxicating Liquors without License—Summary Trial—Cross-examination to Credit—Discretion of Magistrate—Criminal Code, sec. 786—Review of Finding.*

On a charge of selling intoxicating liquor without a license on a certain afternoon, there being another charge pending against the accused for doing the same during the forenoon, and similar charges against other hotel keepers for doing the same during the forenoon and afternoon of the same day:—

*Held*, that the magistrate had a discretion as to allowing counsel for the accused to ask witnesses on cross-examination whether they had been in the defendant's hotel during the forenoon, and whether they had been in one of the other hotels that forenoon and afternoon, notwithstanding sec. 786 of the Criminal Code, R.S.C. 1906, ch. 146.

*Held*, also, that on a motion to quash the conviction there could be no review of the finding of the magistrate that there was a sale of intoxicating liquor.

MOTION to quash a conviction of the defendant, under the Liquor License Act, for selling intoxicating liquor without the license required by law, in the circumstances set out in the judgment.

The motion was argued before TEETZEL, J., in Chambers, on February 12th, 1909.

*J. Haverson*, K.C., for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

February 17. TEETZEL, J.:—Motion to quash a conviction under the Liquor License Act, whereby the defendant was found guilty of selling intoxicating liquor without the license required by law.

The objections relied upon were:—

(1) That the evidence did not shew that the liquor sold was intoxicating.

(2) That the accused was not allowed to make his full answer and defence and to have all witnesses examined and cross-examined by counsel, as was his right under sec. 786 of the Criminal Code, R.S.C. 1906, ch. 140.\*

\*786. In every case of summary proceedings under this Part, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor.

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Upon the argument I refused to give effect to the first objection.

As to the second objection, it appears that the charge preferred against the accused was with reference to an alleged sale between the hours of two and six o'clock in the afternoon of September 24th, 1908, and three witnesses were called to prove the charge, and each of them located the time as between those hours.

It was stated in argument by counsel that another charge was made against the accused for unlawfully selling in the forenoon of the same day, and that similar charges had been preferred against the keepers of other hotels during the forenoon and afternoon of the same day.

Upon cross-examination, Mr. Haverson, counsel for the accused, asked each of the witnesses whether they had been in the hotel of the accused during the forenoon of September 24th, and whether they had been in one of the other hotels that forenoon or that afternoon. Upon objection being taken by counsel for the prosecution, the magistrate ruled that the witnesses were not bound to answer either of the questions indicated.

In support of the objection, Mr. Haverson relied upon *Regina v. Sproule* (1887), 14 O.R. 375, wherein a conviction was quashed on the ground that the justices refused to allow the cross-examination of a witness with reference to his communication with one of the justices trying the case, and in refusing to allow the justice to be sworn as a witness. The proposed cross-examination and examination in that case were touching matters which, if proven, would disqualify the justice from sitting in the case, and the Divisional Court was of opinion that the questions, being pertinent and relative to the status or question of disqualification of a member of the tribunal, were material and should have been permitted.

It is to be noted that *Regina v. Sproule* was not followed in *Regina v. Brown* (1888), 16 O.R. 41, in which the view was expressed by Armour, C.J., at p. 46, as follows:—

“True it is that by our law a person so charged ‘shall be admitted to make his full answer and defence thereto,’ but this does not permit his making a counter-charge against the Judge that he has a disqualifying interest in his prosecution. *Regina v. Sproule*, 14 O.R. 375, is opposed to this my view, but there

being no appeal from our decision, we must give our independent judgment upon the matter."

In my view, the questions proposed to be asked in this case were irrelevant, and, if answered by the witnesses, could not have been contradicted by the accused, nor could it be said upon the record heré that the questions were proper for the purpose of discrediting the witnesses.

The answer to the objection is well expressed in *Spenceley v. De Willott* (1806), 7 East 109, at p. 110: "The Court were all decidedly of opinion that it was not competent to counsel, on cross-examination, to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him; if he answered in the negative, by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said. They observed that the rule had been laid down again and again, that upon cross-examination to try the credit of a witness, only general questions could be put, and he could not be asked as to any collateral and independent fact merely with a view to contradict him afterwards by calling another witness. The danger of such a practice would be obvious, besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce, and which the other could not be prepared to meet."

See also *Tolman v. Johnstone* (1860), 2 F. & F. 66; Roscoe's *Nisi Prius Evidence* (18th ed.), p. 178; Phipson on *Evidence* (4th ed.), 465.

The motion will therefore be dismissed with costs.

The defendant appealed to a Divisional Court, on the same grounds as those stated above.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on March 1st, 1909.

*J. Haverson*, K.C., for the defendant, contended that he should have been allowed, when before the magistrate, to cross-examine

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the Crown witnesses to credit and to discover the facts; that even if the questions were irrelevant, he was entitled to have them answered, although he would be bound by the answers, and could not contradict the witnesses. He also contended that on the evidence—which was to the effect that the defendant, or his bartender, sold, on the occasion referred to in the information, a mixture of whisky and ginger-ale—there was nothing to shew that there was a sale of intoxicating liquor, *i.e.*, that the mixture contained alcohol in quantity sufficient to intoxicate.

*J. R. Cartwright*, K.C., for the Crown.

THE COURT were unanimous in the opinion that there could be no review of the finding of the magistrate that there was a sale of intoxicating liquor.

FALCONBRIDGE, C.J., and BRITTON, J., upon the other question, were of opinion, without laying down any general rule, that the magistrate had a discretion to refuse to allow the questions to be put, having regard to the fact that another charge was pending against the defendant for an offence alleged to have been committed on the same day during different hours—the questions put and not allowed to be answered being in respect of events happening on that day, and the magistrate having confined the cross-examination to the particular hours stated in the information for the offence which was the subject of the present conviction.

RIDDELL, J., was of opinion that the evidence said to have been excluded, before any complaint could be heard on appeal against such exclusion, should have been specifically tendered; not having been so tendered, the appeal should not be sustained in any case; that the questions could not possibly be material, and it was within the discretion of the magistrate to refuse to allow them to be put. For these reasons, the appeal should be dismissed.

The appeal was dismissed with costs.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

HUNT V. TRUSTS AND GUARANTEE CO.

C. A.

1905

*Distribution of Estate—Ascertainment of Next of Kin—Legitimacy—Foreign Law—Conflict of Expert Testimony—Determination by Court.*

Dec. 30.

ON appeal by the defendants from the judgment of Anglin, J., reported 10 O.L.R. 147, upon the question as to the legitimacy of Parley Hunt, Jr., half-brother of George Washington Todd, in the report below mentioned, the Court of Appeal on December 30th, 1905, affirmed the judgment and dismissed the appeal.

A. H. F. L.

## [IN CHAMBERS.]

REX V. IRISH.

1909

*Intoxicating Liquors—Ontario Liquor License Act, sec. 50—Unlicensed Hotel—Permitting Liquor to be Consumed—"Occupant"—"Permit"—Mens Rea.*

Apr. 1.

The defendant was the owner of an unlicensed public house or hotel, which he had leased to his son; the defendant lived in the hotel as a boarder:—*Held*, that he was not an "occupant" within the meaning of that portion of sec. 50 of the Liquor License Act which provides that the occupant of an unlicensed house shall not "*permit* any liquor, whether sold by him or not, to be consumed upon the premises."

*Held*, also, that the word "permit" indicates authorization, either expressly or tacitly, proceeding from the occupant personally, and involves a *mens rea*; and, there being no evidence that the defendant knew or in any way authorized or connived at the drinking on the premises for "permitting" which he was convicted, that, even if he were an occupant, the conviction could not be sustained.

MOTION to quash a conviction of the defendant under the Ontario Liquor License Act. The facts are stated in the judgment.

The motion was heard by MULOCK, C.J.Ex.D., in Chambers, on the 19th March, 1909.

J. Haverson, K.C., for the defendant.

M. B. Tudhope, for the informant.

The Crown was not represented.

April 1. MULOCK, C.J.:—This is an application to quash the conviction of the defendant for that he did, "at the town of Orillia,

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unlawfully permit liquor to be consumed upon the premises of the Simcoe House, being a house of public entertainment and kept by him, without the license therefor by law required."

The conviction is made under that portion of sec. 50 of the Liquor License Act, R.S.O. 1897, ch. 245, which enacts as follows: "Nor shall the occupant of any such shop, eating-house, saloon, or house of public entertainment, unless duly licensed, permit any liquor, whether sold by him or not, to be consumed upon the premises, by any person other than the members of his family or employees, or guests not being customers."

The evidence is to the following effect:—

Robert Johnson swore that on the 28th November last he drove to the stable of the Simcoe House with his team; that either Megahy or Warner was in charge of the stable; that "they both worked for Irish;" that Johnson found a bottle of whisky in the manger when he went to feed his horses; that he drank from the bottle, and offered a drink from it to Megahy and Warner, who refused to drink; that Johnson gave drink to two or three other fellows; that he did not pay for the whisky nor know who placed it there, and "hardly thinks that they" (Megahy and Warner) saw him drinking.

John C. Dunn, another witness, testified that he was with Johnson on the 28th November in the stable; that Megahy was working in the stable, but the witness was unable to say whether Megahy saw him drinking.

Thomas Thompson, another witness, swore that he was with Robert Johnson and Dunn in the stable on the occasion in question, and had a drink of whisky; that, so far as he knew, the defendant had no knowledge of his getting a drink.

For the defence it appears from the evidence of the defendant that he is the owner of the Simcoe House; that on the 24th November last he leased the premises to his son, and that since that date the defendant and his wife have resided on the premises, paying their board.

A person to be liable under sec. 50 for permitting liquors to be consumed on unlicensed premises must be the occupant thereof within the meaning of the section. He must not only be such occupant, but his occupancy must be of a nature that clothes him with authority to permit, and inferentially not to permit, liquor to be consumed thereon. The "occupant" within the meaning

of this section must be a person enjoying such possession or control over the premises as entitles him to regulate the use which is being made of them. Explicit language would be necessary in order to make criminally liable for acts committed on the premises a person not having the legal control thereof, or not in a position to prevent the commission of such acts. If, here, the person charged is not in such occupation of the premises as entitles him to prevent consumption of liquor thereon, it follows that he is not such occupant as can permit the same within the meaning of the statute. The defendant is the owner of the premises, but the owner is not necessarily the occupant. Ownership is a matter of title; occupancy here means legal possession or control.

The matters complained of occurred since the defendant leased the premises. There is no evidence that he ever was "occupant" except as boarder. Under the Act the owner, unless he is also an occupant, is not liable. Here the defendant, in the capacity of boarder, may be an occupant of the portion of the premises assigned for the personal use of himself and his wife, but presumably this did not include the stable, where the act complained of was committed. A mere boarder in a house of public entertainment is not in such possession or control of the whole premises as to be liable criminally for the illegal consumption of liquor without his knowledge, consent, or connivance on a portion of the premises not under his control.

Being of opinion that the defendant was not an "occupant" of the Simcoe House within the meaning of the statute, the conviction cannot, I think, be sustained.

But, even if the defendant were such occupant, there is a fatal objection to the conviction. The prohibition of the statute is that the occupant shall not "permit" liquor to be consumed upon the premises. The word "permit" is here used as indicating authorization, either expressly or tacitly, proceeding from the occupant personally, and involves moral guilt, a *mens rea*. To hold otherwise would be to misinterpret the statute. A person cannot be morally guilty in respect of an act committed without his knowledge, consent, or connivance. The Legislature has not said that the occupant should be liable under all circumstances, but only in the event of his permitting; *i.e.*, there may be a consumption of liquor on the premises with his permission, in which event he is liable; but,

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impliedly, he is not liable if the drinking is not with his permission.

There is no evidence that the defendant permitted or knew of the drinking in question, or in any way authorized or connived at the same. If Megahy or Warner knew of it—which is left in doubt—there is nothing to shew their connection with the defendant, except that “they both worked for Irish.” Assuming that they were stablemen, the defendant did not authorize them to permit drinking in the stable, nor in fact did they permit the same, although it may have occurred in their presence. They having no authority from the defendant to permit such drinking, the defendant is not affected by their conduct: *Somerset v. Hart* (1889), 12 Q.B.D. 360; *Somerset v. Wade*, [1894] 1 Q.B. 574.

For these reasons, I think the conviction should be quashed with costs.

E. B. B.

## [IN CHAMBERS.]

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April 26.

RE LAKE ONTARIO NAVIGATION CO.

DAVIS'S CASE.

HUTCHINSON'S CASE.

*Company—Winding-up—Contributory—Shares—Application on Condition that no Further Call be Made—Acceptance—Allotment—Right to Repudiate—Conduct Approbating Contract—Estoppel—Director—Misfeasance—Loss to Company.*

A company organised under the Ontario Companies Act cannot issue shares at a discount, and *prima facie* in a winding-up proceeding the holders of shares are liable for the full amount unpaid thereon, notwithstanding that they may have been issued as paid-up, if in fact they were not paid-up.

D. applied to a company so organised for 130 shares “upon which there has been paid ten per cent. of the par value thereof,” and agreed to pay therefor \$1,300 “on the condition that no further call be made thereon.” At a meeting of the directors of the company a resolution was passed accepting the application “and that the shares be and the same are hereby allotted and issued to him,” etc. In the minutes of the meeting, following the entry of the resolution, it was stated that the shares were allotted and issued on the condition that no further call would be made thereon. H., a director and president of the company, notified D. of the acceptance of his application; and a few days later D. sent his cheque to the company for \$1,300, and gave a shareholder a proxy to vote on the shares so allotted, which proxy was exercised at a shareholders’ meeting. A dispute arose at the meeting in regard to D.’s shares, and, learning of it from H., D. decided to have nothing further to do with the company, and stopped payment of his cheque, H. concurring in this and instructing the company’s secretary not to present the cheque for payment. There was no minute of any

subsequent meeting of the directors; nothing further was done by D. in the way of repudiation; and three months later an order was made for the winding-up of the company. D.'s name was entered on the company's register as the owner of 130 shares, and a certificate that he was such owner, but not stating that the shares were fully paid, or were not subject to call, was signed by the president and secretary, but not delivered to D.:—*Held*, that D. might have successfully repudiated the contract the moment he heard of the allotment, because the condition attached to the application was not within the power of the directors to comply with; yet, not having done so, but having given a cheque for the purchase price, and (by proxy) voted on the shares, his conduct was only consistent with an intention to be treated and to treat himself as a shareholder, and he was estopped from disputing his liability, and should be placed on the list of contributories in the winding-up.

*In re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch.D. 98 followed.

*Held*, also, that but for H.'s intervention the cheque would have been paid, and he was guilty of a breach of his duty as a director which amounted to misfeasance within the meaning of sec. 123 of the Dominion Winding-up Act; and he was ordered to pay \$1,300 to the liquidator.

APPLICATION by the liquidator of the company, in winding-up proceedings, to place William E. Davis on the list of contributors in respect of \$13,000 stock in the insolvent company.

Application, also, by certain shareholders of the company, under sec. 123 of the Dominion Winding-up Act, for an order requiring one Hutchinson, a director of the company, to pay to the liquidator \$1,300 and interest, because of misfeasance in office in regard to a cheque for \$1,300 which William E. Davis sent to the company in payment for his shares.

The winding-up order was made by TEETZEL, J., and the subsequent proceedings were had before him, instead of before a Master or referee, which is the usual way.

The two applications were heard on the 29th March, 1909.

C. A. Masten, K.C., for the liquidator.

J. H. Moss, K.C., for the majority shareholders.

F. J. Dunbar, for William E. Davis.

I. F. Hellmuth, K.C., for Hutchinson and the minority shareholders.

April 26. TEETZEL, J.:—Application to place William E. Davis on the list of contributors in respect of \$13,000 stock in the insolvent company.

Davis was a friend of F. T. Hutchinson, who was president of the company. On or about the 2nd February, 1907, he was solicited by Hutchinson to apply to the company for 130 shares of \$100 each, on which Hutchinson said ten per cent. had been

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paid, and which he represented could be purchased on payment of an additional ten per cent., with no further liability for calls; and on that day Davis signed and forwarded to the company an application in the following words:—

“To the Lake Ontario Navigation Company, Limited.

“I hereby apply for the sale or issue to me of one hundred and thirty shares of the capital stock of your company, upon which there has been paid ten per cent. of the par value thereof, and agree to pay therefor the sum of \$1,300.

“I apply for these shares on the condition that no further call be made thereon.

“Dated this 2nd day of February, 1907.”

At a meeting of the directors on the same day, a resolution was passed accepting the application in the following words: “Moved by Mr. Hazlett, seconded by Mr. Rutherford, that the application of Mr. W. E. Davis for 130 shares of the ten per cent. stock of the company (being the stock upon which has been paid only ten per cent.) be accepted, and that the said shares be and the same are hereby allotted and issued to him, for and in consideration of the sum of \$1,300 to be paid upon demand, and that a certificate be forthwith issued to the said W. E. Davis.”

Then follows this entry in the minutes: “The said shares were allotted and issued on the condition that no further call would be made thereon.”

Davis was notified by Hutchinson of the acceptance of his application. On the 11th February, 1907, Davis sent his cheque to the company for \$1,300, and also gave to a shareholder a proxy to vote on the shares allotted to him, which proxy was exercised at the shareholders' meeting that day on the election of directors.

Some dispute arose at the meeting in regard to Davis's stock, and, on this being reported to Davis by Hutchinson, Davis decided to have nothing further to do with it, and he telephoned the bank to stop payment of the cheque. The evidence establishes that Hutchinson concurred in the payment of the cheque being stopped, and that he instructed the company's secretary not to present it for payment.

There is no minute of any subsequent meeting of the directors, and nothing further was ever done by Davis in the way of repudiation.

The winding-up order was made on the 14th May, 1907.

Davis's name is entered on the company's register of transfers as the holder of 130 shares, as of the 9th February, 1907, and there is with the company's papers a certificate, which was never delivered to Davis, signed by the president and secretary, dated the 9th February, 1907, certifying that Davis is the owner of 130 shares of the company's stock, but not stating that they are fully paid—or not subject to call.

The questions for determination are: first, whether the condition attached to his application not being within the power of the directors to legally comply with, though in form they purported to do so, affords any answer to the motion to place him on the list of contributories; and, second, whether by subsequent conduct he is estopped from relying on that defence.

No questions of company law are more clearly settled than that a company organised under the Ontario Companies Act cannot issue shares at a discount, and that *primâ facie* in a winding-up proceeding the holders of shares are liable for the full amount unpaid on shares issued to them, notwithstanding that they may have been issued as paid-up, if in fact they were not paid-up. See *In re Almada and Tiritto Co.* (1888), 38 Ch.D. 415; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125; *Welton v. Saffery*, [1897] A.C. 299; *In re Railway Time Tables Publishing Co., Ex p. Welton*, [1895] 1 Ch. 255; *Re Wiarton Beet Sugar Manufacturing Co., McNeil's Case* (1905), 10 O.L.R. 219.

Unless, therefore, it can be held that the condition contained in the application that no further call should be made on the shares in question brings the case within such authorities as *In re Richmond Hill Hotel Co., Pellatt's Case* (1867), L.R. 2 Ch. 527, and *Re Standard Fire Insurance Co., Turner's Case* (1884), 7 O.R. 448, 459, Davis cannot in any event escape liability.

So far as allotment was concerned, the directors in fact, although not in law, literally complied with the condition,

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though the certificate, which was signed, but not delivered, did not in terms comply with the condition. There is no doubt that all parties intended that there should be no further liability for calls, but they misapprehended the law on the question. In an action by the company to compel Davis to take the shares, he would have had a perfect defence on the ground that the application for shares was subject to a condition precedent which the company was not capable of observing, and therefore for the want of mutuality the application, though in terms accepted by the company, was not enforceable against the applicant; in other words, the company could not disregard the condition and force upon the applicant something he did not ask for.

The point of the decision in the *Pellatt* case, *supra*, was that Pellatt was not a contributory, for that he had only agreed to take the shares upon the conditions of the special agreement as to set-off, which, if *ultra vires* of the company, was not binding on the company, and therefore for want of mutuality not binding on Pellatt; and, if *intra vires*, was still not enforceable against Pellatt because the stipulations on the part of the company had become incapable of being performed.

Unless, therefore, the conduct of Davis after sending in his application was such as to estop him from disputing his liability as a shareholder or to establish an agreement with the company to hold the shares subject to the liability imposed by law, he is entitled to succeed.

Mr. Masten, for the liquidator, relied chiefly on *In re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch.D. 98. In that case the Court of Appeal held, in allowing the appeal, that, although the contract under which the respondent took the shares could not have been enforced against her, she, having, with knowledge that her name was on the register as the holder of the shares, dealt with them as if she had been a member of the company in respect of them, had assented to keep them, and was liable under the 25th section of the Companies Act, 1867, to pay the whole amount of them in cash, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into. Bowen, L.J., at p. 117, says: "The question is, whether the respondent, whose name is upon the

register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognise, and the company had no right, disregarding the condition, to force upon her something which she had not asked for. If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for. But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is."

Now, can it be said that what was done in this case by Davis was only consistent with an intention on his part to be treated as a member of the company? Beyond sending his cheque in payment, the only act he did in support of this view was giving a proxy to a shareholder to vote on the shares which had been appropriated to him. So far as appears, both Hutchinson and Davis were honestly ignorant of the law which made it impossible to allot the shares in the terms of the application. For the purposes of the motion Davis must be presumed to have known the law and not to have been fraudulently deceived by Hutchinson. Everything was done by the company to make Davis a member, and, having been advised by Hutchinson of the fact, he gave a proxy to vote on his shares for him and gave his cheque for the purchase price. The shares were voted on at the election of directors, and it was stated by counsel that one result of voting on his shares was to elect a board favourable to Hutchinson and opposed to the view of shareholders who but for the Davis shares were in a majority.

Now, in the light of *Pellatt's Case* and the *Sandys case*,

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*supra*, the moment he heard of the allotment he might have successfully repudiated the contract and been relieved from obligation to carry it out. He does not do this, but, with the full knowledge of the facts, though ignorant of his legal rights, he treated himself as a shareholder by giving the proxy to vote on these shares.

To paraphrase the language of Bowen, L.J., *supra*, I think his action after notice of the allotment was only consistent with an intention on his part to be treated as a member of the company and to treat himself as a member of the company in respect of these shares which had been appropriated to him.

It is not necessary to find that he expressly agreed to accept the shares subject to liability to calls, because once he is in a position as a member of the company there is a statutory liability under sec. 68 of the Ontario Companies Act, 7 Edw. VII. ch. 34, and sec. 51 of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, to contribute the amount unpaid on his shares.

As to the effect of voting on shares, see *Hindley's Case*, [1896] 2 Ch. 121; *Sharpley v. Louth and East Coast R.W. Co.* (1876), 2 Ch.D. 663; and *Hutchinson's Case*, [1895] 1 Ch. 226.

It is correctly stated by Mr. Lindley in his *Law of Companies*, 6th ed., p. 1079, that "few questions present more difficulty than those which arise when a person, who has agreed to take paid-up shares, is sought to be put on the list in respect of shares which are not paid up. He naturally desires to repudiate them, but he seldom can do so unless the matter rests merely in agreement;" and in the subsequent pages he collects all the authorities bearing upon this difficult question.

While the matter rested merely in agreement between the company and Davis, he could not have been placed on the list of contributories, but I think, on the authority of the *Sandys* case (*supra*), that what he did was an election by him *to treat himself and to be treated as a member of the company*, and he cannot now as against the liquidator be relieved from statutory liability.

I direct therefore that his name be placed upon the list of contributories for 130 shares, upon which 10 per cent. only has been paid, with the costs of the motion.

IN HUTCHINSON'S CASE, the motion was by certain contribu-

tories, represented by Mr. Moss, against Hutchinson, under sec. 123 of the Winding-up Act, on a charge of misfeasance in regard to the cheque of \$1,300 which Davis sent to the company in payment of his shares.

It is quite clear upon the evidence that but for Hutchinson reporting to Davis the dispute at the meeting in regard to Davis's shares, Davis would not have stopped payment of the cheque, and I also find upon the evidence that Hutchinson agreed with Davis that the best thing for him to do was to stop payment of the cheque, and later instructed the company's secretary not to present it for payment or collect it. I further find that Davis was good for the amount of the cheque, and that he had made provision at his bank for meeting it on or about the 18th February, 1907, and that but for Hutchinson's intervention it would have been paid.

Hutchinson's conduct in the matter was, in my opinion, an active breach of duty, in other words, misfeasance within the meaning of sec. 123\* of the Winding-up Act, R.S.C. 1906, ch. 144. in relation to the company of which he was president, which resulted in the company losing \$1,300.

The law in regard to the general duty of a director is, I think, correctly stated at p. 197 of Messrs. Parker & Clark's valuable book on Company Law, upon the authorities there cited by them, as follows: "It is clear that the duty of a director makes it incumbent on him to give his whole ability, business knowledge, exertion and attention to the best interests of the shareholders who place him in that position when these interests are involved, and it is incumbent upon him to assume no part which will be inconsistent with the proper, free and independent discharge of his duties in that respect."

In *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450, at p. 453, Jessel, M.R., says: "They (the directors) are

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\*123 Where in the course of the winding-up of the business of a company under this Act, it appears that any past or present director . . . has . . . been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, . . . examine into the conduct of such director . . . and, upon such examination, may make an order requiring him to . . . contribute such sums of money to the assets of the company, by way of compensation in respect of such . . . misfeasance or breach of trust, as the court thinks fit.



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no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company."

In *Spackman v. Evans* (1868), L.R. 3 H.L. 171, Lord Cranworth, at p. 186, says: "The duty of the directors, when a call is made, is to compel every shareholder to pay the company the amount due from him in respect of that call; and they are guilty of a breach of their duty to the company if they do not take all reasonable means for enforcing that payment."

I therefore order that Hutchinson pay to the liquidator \$1,300 with interest at 5 per cent. from the 18th February, 1907, and costs of the motion.

E.B.B.

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[DIVISIONAL COURT.]

D. C.  
 1909  
 April 29.

RE ANDERSON AND KINRADE.

*Coroner—Jurisdiction—Issue of Warrant to Arrest Witness Disobeying Summons—Ministerial Act—Certiorari—Prohibition—Place of Execution of Warrant—Re-examination of Witness.*

*Certiorari* will not lie to remove a warrant issued by a coroner for the apprehension of a witness, upon default in obeying a summons to appear and testify, because the coroner in issuing the warrant is acting in a ministerial and not a judicial capacity: R.S.O. 1897, ch. 97, sec. 5.

A coroner is a local officer who can act only within his own municipal jurisdiction; and a warrant to apprehend issued by him cannot be validly executed out of his county.

The fact that a witness at an inquest has already been questioned at great length is not a ground for prohibiting the coroner from subjecting her to further examination; the Court assumes that the coroner will not permit the witness to be unduly harassed.

MOTION on behalf of Florence Kinrade, upon the return of a writ of *certiorari*, to quash a warrant issued by one Anderson, a coroner, at the city of Hamilton, requiring the peace officers to whom it was addressed to bring the applicant before him, the coroner, at Hamilton, to be dealt with according to law; or, in the alternative, for a prohibition to the coroner and officers to prevent the enforcement of the warrant.

The applicant had been summoned by the coroner, by a subpoena or summons served upon her at Toronto, to appear before him at Hamilton to give evidence upon an inquest being held for

the purpose of ascertaining the cause of the death of Ethel Kinrade, a sister of the applicant. The applicant did not attend in obedience to the subpoena or summons, and the warrant was issued after her default had been shewn. The applicant had already been examined as a witness before the coroner at considerable length.

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The motion was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 28th April, 1909.

*G. Lynch-Staunton, K.C., T. C. Robinette, K.C., and T. Hobson* for the applicant. In this province a coroner is a statutory officer, and nothing more: The Act respecting Coroners, R.S.O. 1897, ch. 97, sec. 1; not, as in England, a common law officer. He has no powers but statutory powers. The coroner's court is not a court of record, in spite of *Regina v. Hendershott* (1895), 26 O.R. 678. Section 17 of the statute says, "by law vested in any coroner." No person has authority to arrest any one for anything, unless it is statutory authority. See *The Queen v. The Judge of the Brompton County Court*, [1893] 2 Q.B. 195, as to the power to punish for contempt of Court. Certain officers are by statute given power to issue warrants, but coroners are not included. A coroner is not given power to send a warrant into another county, even with indorsation. He has no power unless the statute gives it to him. The limits of the powers of inferior courts are indicated in *Young v. Saylor* (1893), 23 O.R. 513, affirmed (1893), 20 A.R. 653. There is no common law right in any Judge to arrest a witness—the remedy is to attach him if he does not obey a subpoena. No inferior court can punish for contempt unless committed in the face of the court. The power at common law is to indict for contempt: *Rex v. Robinson* (1759), 2 Burr. 800; *The Queen v. Lefroy* (1873), L.R. 8 Q.B. 134. This warrant is for contempt. See Tremear's Criminal Code, 2nd ed., forms at p. 916 *et seq.* In the form under sec. 677 of the Code, the warrant is to bring the person before the Court *to testify*. This is not that warrant. The warrant shall shew the cause—that is elementary. The Court is not to conjure up another cause than that stated. If this warrant were pleaded as justification in an action for trespass, it would be of no avail. A person may not be committed for disobedience of a subpoena, even in the High Court, unless it be shewn that he can give material evidence: *Dicas v. Lord Brougham* (1835), 1 Gale 14; *Dicas v.*

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*Lawson* (1835), 3 Dowl. 427. It is not shewn that the applicant can give material evidence. She has already told all she knows; she should not be examined—no person can be examined—with a view to making her convict herself. There is no authority for the examination of witnesses by counsel at a coroner's inquest. As to the jurisdiction to commit for contempt, see *Re Pacquette* (1886), 11 P.R. 463. No person can be asked criminating questions before a coroner's jury. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5 (2), means that a person in such a position should not be put into the witness box. See sec. 667 of the Criminal Code as to the effect of the finding of a coroner's jury. The coroner has exhausted his authority. Having summoned this witness, he has no power to summon her again.

*J. R. Cartwright*, K.C., for the Crown. The proceeding is wrong; *certiorari* does not lie; the warrant has not been executed: see Burn's Justice, 30th ed., vol. 1, p. 621. As to the jurisdiction of the coroner, see *ib.*, p. 1215. A coroner is a magistrate; his court is a court of record: *Thomas v. Churton* (1862), 2 B. & S. 475; *Garnett v. Ferrand* (1827), 6 B. & C. 611, 625; *Agnew v. Stewart* (1862), 21 U.C.R. 396; *Garner v. Coleman* (1868), 19 C.P. 106; *Davidson v. Garrett* (1899), 30 O.R. 653, 656. The coroner's powers do not depend upon the statute; he has all the common law powers of a coroner: Boys on Coroners, 3rd ed., p. 1 *et seq.*; and, among them, the power to commit: Bac. Abr., vol. 2, p. 239 *et seq.*; Encyc. of Laws of Eng., vol. 3, p. 674 *et seq.* Backing warrants is the adoption of a common law practice: Lewis's Blackstone, vol. 4, p. 492; Chitty's Criminal Law, 2nd ed., vol. 1, p. 45. There is no pretence for saying that the primary summons cannot be served anywhere in the Province. For the form of warrant, see Umfreville's Lex Coronatoria (1761), p. 512. As to the right to bring this warrant up on *certiorari*, see *Rex v. Drummond* (1903), 88 L.T.R. 833. The issue of the warrant is not a judicial act. A witness may be punished by the coroner for contempt: Am. & Eng. Encyc. of Law, 2nd ed., vol. 7, p. 607. If the coroner is *persona designata*, no prohibition will lie: *In re Godson and City of Toronto* (1889), 16 A.R. 452. There is no oppression; no desire to convict the witness; the Crown seeks to examine her about matters arising since her former examination.

*J. B. Mackenzie*, also for the Crown. As to the powers of the

coroner, see Blackstone, Lewis's ed., vol. 1, p. 348. There is no right to a *certiorari*: *Rex v. Lediard* (1751), Sayer R. 6; *Rex v. Lloyd* (1783), Caldecott's J. P. Reports 309. The only remedy which this witness may have when the warrant is executed is an action for trespass. It has been held that a distress warrant is not a judicial act: *Regina v. Coursey* (1895), 27 O.R. 181; *La Fabrique de Montreal v. Hudon* (1872), 4 Rev. Leg. 271; *Ex p. Taunton* (1831), 1 Dowl. 54. A search warrant may be removed: *Rex v. Kehr* (1906), 11 O.L.R. 517. See also *In re Constables of Hipperholme cum Brighthouse* (1847), 5 D. & L. 79; *The Queen v. Church Wardens and Overseers of Hatfield Peverel* (1849), 14 Q.B. 298; *The Queen v. Webber* (1899), 16 Times L.R. 1. As to proceeding by indictment, see *The King v. Davies*, [1906] 1 K.B. 32.

*Lynch-Staunton*, in reply. We rely on *Rex v. Kehr*, 11 O.L.R. 517; also *In re Sproule* (1886), 12 S.C.R. 140. We are entitled to prohibition against enforcement of the warrant: *Rex v. Tristram*, [1902] 1 K.B. 816, 829; *Rex v. Robinson*, 2 Burr. 800. The coroner's powers are limited by sec. 940 of the Criminal Code.

April 29. The judgment of the Court was delivered by BOYD, C.:—This application was argued upon the merits, subject to a preliminary objection. I have considered the matter in both aspects, and will briefly give my conclusions.

First, I think that the proceeding by way of *certiorari* is not the proper method of seeking redress. The coroner, in issuing the warrant to apprehend, based upon default in obeying the summons to appear and testify, was acting not in a judicial but a ministerial capacity. His duty is to serve such witnesses as may be indicated by the Crown or its representative, and to follow up that summons, in the event of default, by enforcing their attendance. Therein he acts not according to his discretion, but according to the mandate of another, as provided by the statute R.S.O. 1897, ch. 97, sec. 5.\* The little authority there is as to the examination of magistrates' warrants upon *certiorari* justifies this distinction and this conclusion. For example, if the warrant is of a judicial character,

\*Before holding any inquest the coroner shall notify the County Crown Attorney of his intention so to do, and the County Crown Attorney, if so directed by the Attorney-General, shall attend at the inquest, and in case he so attends he may, if he thinks fit, examine or cross-examine any witnesses called at the inquest, and the coroner shall summon such witnesses as the County Crown Attorney directs.



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such as a search warrant, *certiorari* will lie; otherwise, if the warrant is of ministerial character: *Rex v. Lediard*, Sayer R. 6; *Rex v. Kehr*, 11 O.L.R. 517.

On the other branch, I think it is very clear that the coroner is a local officer, and can act only within his own municipal jurisdiction. Whether the service of his summons out of the county be or be not a valid service, I do not express an opinion, but I am very well satisfied that the warrant to arrest or apprehend, based thereon, cannot be validly executed in another county. This is pretty distinctly indicated in *Jervis on Coroners*, 2nd ed., pp. 54 and 55, and 6th ed., p. 85, and *Encyc. of Laws of England*, 2nd ed., vol. 3, p. 687, where it is said that the precise point has never been decided. But a similar situation has been judicially passed upon in this Province in *Grantham v. Bishop* (1851), 1 C.P. 237, to the effect that the process of a local officer cannot be legally carried into effect outside of his territorial jurisdiction.

I do not think we should interfere on the ground that the witness, having been already questioned at great length, should not be subjected to further examination. We must assume that the magistrate will not permit the witness to be unduly harassed; that he will not permit the examiner to go over ground already traversed; that he will not permit any line of inquiry tending to lay a foundation for collateral purposes; and, from what was said by the Deputy Attorney-General in Court, it is to be assumed that the witness is to be examined on new matter lately disclosed or discovered.

The application is dismissed; no costs.

E. B. B.

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## [IN THE COURT OF APPEAL.]

## REX v. DUBÉ.

C. A.

1909

May 13.

*Criminal Law—Money Lenders Act—Conviction for Lending Money at Usurious Rate—Scheme to Evade Act—Discount at Bank—Brokerage—Evidence.*

The defendant, a money lender, was convicted by a magistrate<sup>†</sup> of lending money at a rate of interest greater than that authorised by the Money Lenders Act, R.S.C. 1906, ch. 22. The evidence shewed that the defendant advanced \$185 to R. on two promissory notes, at one and two months, for \$100 each, the rate of interest thus being apparently 60 per cent. per annum. The defendant, however, explained the charge of \$15 by shewing that he discounted the notes with a chartered bank, for which the bank received \$1.50, and that the balance of \$13.50 was charged as "brokerage"—he being, as he said, not a principal, but a broker or agent. The magistrate found that the accused was a principal, and that the transaction with the bank was merely a shift to avoid the penalties of the Act:—

*Held*, that there was evidence upon which the magistrate could properly so find; and the conviction was affirmed.

CASE stated by the police magistrate for the city of Ottawa as follows:—

"J. Hector Dubé was tried, with his own consent, under the provisions of Part XVI. of the Criminal Code, before the undersigned . . . upon an information charging him with having lent money at a rate of interest greater than that authorised by the Money Lenders Act.\*

"It appeared from the evidence that Dubé carried on business as a private banker and general broker, and it was admitted that he was a money lender, within the meaning of the Act.

"A few days prior to the 2nd April, 1908, one Richard S. Raby, a civil servant, applied to Dubé for a loan of \$200. Raby had previously borrowed money from Dubé, and he had given to Dubé a power of attorney to receive the monthly cheques for his salary. Dubé informed Raby that it would be necessary for the latter to bring him notes indorsed by an indorser satis-

\* R.S.C. 1906, ch. 22. Section 6 provides: "Notwithstanding the provisions of the Interest Act, no money lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per centum per annum; and the said rate of interest shall be reduced to the rate of five per centum per annum from the date of judgment in any suit, action or other proceeding for the recovery of money due." And sec. 11 provides: "Every money lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than that authorised by this Act."

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factory to him. Two promissory notes for \$100 each, made by Raby, payable to the order of one J. L. Payne, a fellow civil servant, at one month and two months respectively, and indorsed by Payne, were brought by Raby to Dubé on the 2nd April, 1908, at the latter's place of business, in Elgin street, in the city of Ottawa. Dubé was satisfied with the indorser, and having prepared two cheques drawn on the Ottawa branch of the Quebec Bank, each payable to "proceeds of my note or bearer," one for \$99.50 and one for \$99, Raby, at Dubé's request, although he had at the time no account with the bank, signed the cheques, and Dubé thereupon handed to Raby \$185, and himself retained the notes and cheques.

"Subsequently on the same day Dubé either took or sent the notes and cheques to the Quebec Bank, the notes having on their back an indorsement by Dubé, in the form of a guarantee. Upon presentation of the notes and cheques to the bank, the notes were discounted at the ordinary bank rate of 6 per cent. per annum, and the proceeds placed to the credit of Raby in the bank's petty discount account, and \$198.50, the amount of the two cheques, being the proceeds of the two notes, less the discount, was then paid by the bank to Dubé, or placed to his credit. No other account was opened by the bank with Raby.

"Dubé, in his testimony, stated that he had acted in the matter as a broker and agent for Raby in obtaining the money from the Quebec Bank; that he had explained to Raby that he could not lend the money himself, but could obtain it if Raby gave him a commission; and that his charge for guaranteeing the payment to the bank would be \$4.50 for one note and \$9 for the other.

"Raby stated that he could not remember Dubé saying that he could not personally lend the money, but could get the money through the bank; and that he had never heard of the brokerage charges of \$4.50 and \$9.

"A copy of the information upon which the accused was tried and a copy of the evidence taken at the trial are annexed hereto and made a part of this case.

"It was argued on behalf of the accused that the loan was not made by him, but by the bank; that he had merely acted as Raby's agent in procuring the loan; and that the \$13.50 received by him (the accused) was for legitimate brokerage charges.

"I came to the conclusion that the accused was a principal, and that the transaction with the bank was merely a shift to avoid the penalties of the Act.

"I found the accused guilty, and he was, by my direction, after entering into a recognisance to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour, released from custody.

"I reserve the following question for the opinion of the Court of Appeal:—

"Was there any evidence upon which I could properly find the accused guilty of the offence charged in the information?"

The stated case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and TEETZEL, J., on the 13th May, 1909.

*W. J. Code*, for the defendant, contended that there was no evidence upon which the magistrate could find that it was not a case of brokerage; that, if it was really a case of brokerage, it was not within the Act; that the Act should be construed strictly and in favour of the liberty of the subject. He referred to *Baynes v. Fry* (1808), 15 Ves. 120; *Ex p. Gwyn* (1832), 2 Deac. & Chit. 12; *Ex p. Goss* (1833), *ib.* 240.

*J. R. Cartwright*, K.C., for the Crown, contended that there was ample evidence to warrant the finding of the magistrate; that the alleged brokerage and the discount were just a dodge; and that the Court will scrutinise carefully what the transaction is. He referred to *Carstairs v. Stein* (1815), 4 M. & S. 192; *Rex v. Henry* (1891), 21 O.R. 113, 119.

Moss, C.J.O. (at the conclusion of the argument):—There was ample evidence upon which the magistrate could properly find as he did. The transaction was a plain one, not altered in its character by the dealing with the bank, which was merely a shroud put upon it. On the findings and evidence the conviction was right. The question should be answered in the affirmative.

OSLER, J.A.:—I agree. The transaction was a colourable one. The magistrate came to the right conclusion.

GARROW and MACLAREN, J.J.A., and TEETZEL, J., also concurred.

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## [DIVISIONAL COURT.]

D. C.

STAVERT V. McNAUGHT ET AL.

1909

April 16.

April 30.

*Jury Notice—Motion to Strike out—Judge in Chambers—Judge at Trial—Practice—Convenience.*

*Held*, reversing an order of RIDDELL, J., in Chambers, striking out a jury notice, that in an action of merely common law character the determination as to the method of trial should not be taken out of the hands of the trial Judge; and that, if he determines that an action on the jury list should be tried without a jury, he should himself try it, because the litigants are entitled to have their cause tried in its order upon the list. The reasons for letting the determination rest with the trial Judge prevail over those of convenience and expedience applied peculiarly to actions tried at Toronto.

Review of the previous decisions.

MOTION by the plaintiff and the third parties to strike out a jury notice filed and served by the defendant McNaught in an action to be tried at Toronto. The facts are stated in the judgments.

The motion was heard by RIDDELL, J., in Chambers, on the 13th April, 1909.

*J. H. Moss*, K.C., for the plaintiff.

*Glyn Osler*, for the third parties.

*F. Arnoldi*, K.C., for the defendant McNaught.

April 16. RIDDELL, J.:—An action upon a promissory note for a large sum, alleged to have been made by the defendant Boland and indorsed by the defendant McNaught. It is alleged that McNaught guaranteed payment of it.

The defendant McNaught denies all allegations; alleges that, if the note was made or indorsed, it was without consideration; and that, if he did so guarantee, this was without consideration; denies that the plaintiff is the holder; alleges that any possession the plaintiff may have is on behalf of and for the Sovereign Bank and as trustee for the Sovereign Bank; and says that, if the alleged note was made or indorsed to the Sovereign Bank, the bank at the time agreed that he should be under no liability in respect thereof, but would indemnify him; and, in the alternative, the making and indorsing were void as being pursuant to an illegal device for concealing and covering up the fact that the Sovereign Bank was purchasing its own shares; and, moreover, that the bank took the shares in satisfaction of the alleged debt upon the note.

The plaintiff replies, holder in due course without notice, and that McNaught was a party to the illegal device, if there was one.

Boland denies everything, and sets up that the note was an accommodation note for the accommodation of the bank.

A third party notice was served for McNaught upon the Sovereign Bank, Æmilius Jarvis, and F. G. Jemmett, claiming indemnification against liability upon the grounds of an express agreement to indemnify him, and that the note was procured by them as a mere device to enable the bank to purchase its own shares; that Jarvis and Jemmett agreed to procure a cancellation.

The third parties appear and deny the allegations in the third party notice, and say that the note was indorsed by McNaught and delivered by him to the bank for valuable consideration.

A jury notice was served for the defendant McNaught, and the case was put upon the jury list for trial at Toronto.

An application is now made by the plaintiff, supported by the third parties, to set aside the jury notice.

It is plain that the making and indorsing of the note will not be contested, and that the plaintiff really has possession of the note; and the real onus will be cast upon the defendants.

The defendant McNaught undertakes to prove facts which will relieve him from liability, while, as against the third parties, he must prove facts establishing liability on their part.

In respect of the plaintiff, the nature of the possession will depend upon the interpretation of a document—that will be for the Judge; while some of the other issues will be of mixed law and fact, depending, to a certain extent, upon the interpretation to be placed upon certain alleged transactions. But no issue is of an equitable nature, so that the principle of *Baldwin v. McGuire* (1893), 15 P.R. 305, does not apply. And I can find nothing which would prevent the trial by a jury if it were thought advisable so to try the action. That, however, does not appear to be the test.

Whatever may be the proper course in cases not to be tried in Toronto—and I agree with the Chief Justice of the Common Pleas that “the rule of practice laid down in *Montgomery v. Ryan* (1906), 13 O.L.R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury:” *Bryans v. Moffatt* (1907), 15 O.L.R. 220,

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at p. 223—the practice in cases to be tried in Toronto, where there are separate lists and separate sittings for the trial of jury and of non-jury cases, is that “if the action is one that plainly ought to be tried without a jury, in order to prevent the jury list from being incumbered with such cases . . . the jury notice” is struck out. This rule, laid down by the Chief Justice of the Common Pleas in *Montgomery v. Ryan*, *supra*, has been approved by a Divisional Court in *Clisdell v. Lovell* (1907), 15 O.L.R. 379, and *Bryans v. Moffatt*, *supra*.

When it can be said that “the action is one that plainly ought to be tried without a jury,” may not be wholly clear. Mr. Justice Anglin says in *Clisdell v. Lovell*, at p. 382: “The jurisdiction to strike out jury notices in Chambers as a matter of discretion should however, be strictly confined to cases in which it is obvious that no Judge would try the issues upon the record with a jury.” Neither of the other Judges in the Divisional Court states the proposition in these terms; nor does the Chief Justice, giving the judgment of the Court, in *Bryans v. Moffatt*.

If the rule be so restricted as is indicated in the judgment of Mr. Justice Anglin, just cited, I am not sure that this case would fall within the rule. It may be that some of my brethren would try this case with a jury, not to speak of the Judge yet *in gremio*. I think the rule indicated in the judgment of the Divisional Court in *Bryans v. Moffatt* should be adopted, namely, that the jury notice should go “where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury.” My opinion is that such is this case.

The jury notice will be struck out. Costs in the cause.

Having tried *Clisdell v. Lovell*, I do not think it can be contended that that case was any less a case for a jury than the present.

The defendant McNaught appealed from the order of RIDDELL, J., and his appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 29th April, 1909.

*F. Arnoldi*, K.C., for the appellant. The order is an assumption of the power and an interference with the discretion properly exercisable by the Judge at the trial: *Regina v. Grant* (1896), 17 P.R. 165, 171. The trial Judge should determine, as he best can,

whether the case should be tried by a jury. The litigant who asks for a jury should not have his right taken away, where the case is one that may properly be tried by a jury. The argument for striking out the jury notice in Chambers is one of convenience. What I assert is a right. [The other cases cited are mentioned in the judgment.]

*J. H. Moss*, K.C., for the plaintiff, and *R. C. H. Cassels*, for the third parties, supported the order of RIDDELL, J., referring to some of the cases cited in the judgments.

April 30. The judgment of the Court was delivered by BOYD, C.:—This is a common law case, in which the issues to be tried are of disputed but not very complicated facts. The defendant who has given notice for a jury has, therefore, a *prima facie* right to have the case submitted for jury trial, subject to control as to the manner of trial, which can be better exercised by the Judge at the trial than at any earlier stage by any other Judge: *per Osler, J.A.*, in *Connée v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 744, 769. This view was enforced, as being the more convenient method, by a Divisional Court in *Bristol and West of England Loan Co. v. Taylor* (1893), 15 P.R. 310; by Mr. Justice Rose in *Hawke v. O'Neil* (1898), 18 P.R. 164, who expressed himself very strongly, after consultation with several of the Judges. Concurrence with this view was expressed by Meredith, C.J., in *Sawyer v. Robertson* (1900), 19 P.R. 172, at p. 174, speaking for a Divisional Court. And he repeats the view that this is the practice in *Shantz v. Town of Berlin* (1902), 4 O.L.R. 730.

In *Lauder v. Didmon* (1894), 16 P.R. 74, it was first pointed out, I think, that it was desirable, where provision was made for the holding of separate jury and non-jury sittings, to have it settled at an early stage which was to be the forum. That was said in a case in which there was no doubt that the notice for trial by jury had been given in a case involving equitable issues, and therefore not properly triable by a jury as of right.

Following upon this, a distinction was drawn by Meredith, C.J., in *Montgomery v. Ryan*, 13 O.L.R. 297 (1906), that though, where the venue was out of Toronto, the practice was to leave the mode of trial to the trial Judge, it should be otherwise in Toronto, where the non-jury sittings are practically continuous throughout the

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year, and then it was advisable to settle in Chambers, by a Judge, whether the jury notice should stand or not. But the Chief Justice was careful to say and to repeat that the case should be one which "plainly" ought to be tried without a jury, in order to invoke interference with the jury notice. That case, *Montgomery v. Ryan*, was a very simple one, of legal nature, and eminently proper to be tried by a Judge alone, on a note, the defence being that part of the amount was discharged by an over-payment of interest. This view was again expressed by Meredith, C.J., in the Divisional Court, in 1907, *Bryans v. Moffatt*, 15 O.L.R., at p. 223, where the action appears to have involved equitable issues and involved the reformation of a document—matters not to be tried by a jury. And the same opinion was expressed by the Court in *Clisdell v. Lovell*, in the same year and volume, 15 O.L.R. 379, in which again equitable issues were involved. All the Judges agreed that these ought not to be tried by a jury, but Mr. Justice Anglin guarded his judgment by saying that the striking out of a jury notice by a Judge in Chambers should be strictly confined to cases in which it was obvious that no Judge would try the issues with a jury. The qualification expressed by this Judge was acted upon by Mr. Justice Teetzel in *Dyment v. Dyment*, 13 O.W.R. 461 (February, 1909), who, sitting in Chambers, declined to interfere, though, had he been trial Judge, he would have been inclined to dispense with a jury.

Next comes the case in appeal, decided by Mr. Justice Riddell, *Stavert v. McNaught* (April, 1909). The case of *Dyment v. Dyment* does not seem to have been brought to the notice of Mr. Justice Riddell, and leave to appeal from his order has been given by Mr. Justice Teetzel that there may be a settled practice (if that is possible).

I favour the opinion expressed by Mr. Justice Anglin, though it may be perhaps a little too broadly, rather than do away with the right of trial by jury in proper cases by the intervention of a Judge in Chambers. The direction in actions merely of common law character, and in which a jury would be the recognised forum, if sought by either party, as to the method of trial, should not be taken out of the hands of the trial Judge. The reasons given for letting that determination rest with him prevail, to my mind, over those of convenience and expedience which are sought to be applied peculiarly to actions tried at Toronto. The non-jury

sittings are continuous throughout the year; so practically are jury sittings if there is anything to be tried; and there is no reason why the trial Judge at the jury sittings, if he comes to a case which, after hearing the counsel, he is of opinion should be tried without a jury, should not transfer that case to the non-jury list, or, which would be better, exchange with the non-jury Judge for the purpose of that particular trial. This adjustment would work less harm than the interlocutory mode of taking away the right to a jury in a case which is *primâ facie* of jury competence, and in which one of the litigants has claimed a jury.

I agree with the course pointed out and the language used by Armour, C.J., in *Bank of Toronto v. Keystone Fire Insurance Co.* (1898), 18 P.R. 113, 117, that litigants are entitled to have their cause tried in its order upon the list, and they are the persons whose convenience ought to be consulted; and therefore that the Judge sitting for jury trials, who holds that a given case is to be tried without a jury, should himself carry out what he has declared, and not turn it over to another Judge, who may think that it ought to be tried with a jury. With Judges sitting concurrently in Toronto for jury and non-jury trials, there should be no real, practical difficulty in interchanging work for the time being.

In this appeal I think the jury notice should be restored; costs in the cause.

My own judgment respecting the matters to be tried in this case, depending almost entirely on the credibility of the opposing parties and their witnesses, would be to submit the controversy for the arbitrament of a jury rather than of a Judge sitting alone.

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## [IN THE COURT OF APPEAL.]

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## RE PORT ARTHUR ELECTRIC STREET RAILWAY.

*Ontario Railway and Municipal Board—Jurisdiction—Street Railway—Control and Management by Commissioners—Agreement between Municipalities—Enforcement—Possession of Railway—Statutes.*

Under an agreement made between two municipalities and confirmed by the statute 8 Edw. VII. ch. 80 (O.), one of the municipalities was, on payment of the amount of an award, to become the owner of a part of an electric railway which theretofore had been owned by the other, although operated in both municipalities, and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided for in the statute and agreement. The amount awarded having been paid, and the appellants, a board of commissioners who had been operating the railway for the municipality which owned it, retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Ontario Railway and Municipal Board was applied to, and such compliance was enforced by its order:—

*Held*, that the Board did not thereby exceed the powers conferred upon it by the Ontario Railway and Municipal Board Act, 1906.

Construction and effect of sec. 16 of that statute, and of 56 Vict. ch. 78, the Ontario Railway Act, 1906, and 8 Edw. VII. ch. 80.

AN appeal by the Board of Electric Railway Light and Telephone Commissioners of the City of Port Arthur against two orders made by the Ontario Railway and Municipal Board, bearing date respectively the 7th November, 1908, and the 14th November, 1908, (1) requiring the appellants to deliver up possession of the railway and its appurtenances, etc., to a new board of commissioners and restraining the appellants from interfering with the railway or the management thereof by the new board, and (2) ordering the sheriff to put the new board into possession.

The appeal was taken on the ground that the Ontario Railway and Municipal Board had no jurisdiction to make the orders complained of.

By 55 Vict. ch. 82, sec. 5 (O.), the corporation of the town of Port Arthur were authorised and empowered to construct and operate an electric street railway in that portion of the municipality of Neebing known as Fort William East, and to extend and operate the same into Fort William West, subject, however, to such terms and conditions as might be imposed by the Lieutenant-Governor in council.

An order in council dated the 31st December, 1892, set forth the terms and conditions subject to which the electric street railway

of the town of Port Arthur was to be constructed, extended, and operated in the town of Fort William; and by 56 Vict. ch. 78 (O.) this order in council was confirmed and declared to be legal and valid and binding upon all persons and corporations affected thereby.

Under these statutes and the order in council the corporation of the town of Port Arthur had the right to operate the street railway in the town of Fort William for twenty years from the 1st December, 1893, at the expiration of which period the corporation of the town of Fort William were to have the right to acquire the railway on payment of such sum as might be agreed upon, or settled by arbitration.

By 7 Edw. VII. ch. 83 (O.) the town of Port Arthur was incorporated as a city; and by 7 Edw. VII. ch. 66 (O.) the town of Fort William was incorporated as a city.

By an agreement bearing date the 11th March, 1908, made between the corporation of the city of Port Arthur and the corporation of the city of Fort William, it was agreed that the corporation of the city of Fort William should acquire, and the corporation of the city of Port Arthur should sell, that portion of the street railway owned and operated by the city of Port Arthur within the limits of the city of Fort William, together with one-half of the rolling stock owned by Port Arthur and accessories appurtenant thereto, as well as all rights to construct and operate railways in Fort William, upon the following terms and conditions, that is to say, an arbitration should be held, to which the corporations of the cities of Fort William and Port Arthur should be parties, as provided by sec. 9 of schedule A. to 56 Vict. ch. 78, except that such arbitration should be held forthwith or as soon as practicable after the passing of the Act validating the agreement, instead of being held on or after the 1st December, 1913, provided that in arriving at the sum to be paid by the city of Fort William to the city of Port Arthur under the terms of the said section, such sum should include the present value of the right which the city of Port Arthur, previously to the making of this agreement, had of operating the said street railway within the limits of the city of Fort William, up to the 1st December, 1913, such value being based on the probable earnings of the railway within the limits of Fort William.

Section 2 of this agreement provided that the arbitration should not be held as provided in sec. 9 of the schedule to 56 Vict. ch. 78,

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but should be held by and before the Ontario Railway and Municipal Board, whose finding and award should be final, binding, and conclusive upon all parties to such arbitration.

Section 3 of this agreement provided that on payment of the amount of the award, as and how the Ontario Railway and Municipal Board might order, the city of Fort William should forthwith be entitled to the full and peaceable ownership of the railway within the limits of the city of Fort William, and the appurtenances thereof, and the property used in connection therewith covered by the award of the Board; and all rights, powers, and privileges of the city of Port Arthur to own, operate, and maintain a street railway within the limits of the city of Fort William should thereupon cease and determine, etc.

By 8 Edw. VII. ch. 80 this agreement was confirmed and declared to be legal, valid, and binding upon the corporations of the two cities and the agreement was incorporated in and made part of the Act, as schedule B.

The Ontario Railway and Municipal Board proceeded with the arbitration, and made an award dated the 4th July, 1908, whereby they found that the actual value to the city of Fort William of that portion of the street railway owned and operated by the city of Port Arthur within the limits of the city of Fort William, and the roadbeds, rails, plant, overhead construction, and appurtenances, having regard to the requirements of the various systems now in operation, together with one-half the rolling stock, and the accessories appurtenant thereto, and the motor generator in the transformer station of the Kaministiquia Power Company in Fort William, and the real estate, was the sum of \$52,000.

During the arbitration the corporations of the two cities entered into an agreement in settlement of the then present value of the right which the city of Port Arthur had previously to the making of the agreement of 11th March, 1908, of operating the street railway within the limits of the city of Fort William up to the 1st December, 1913. This agreement was made part of the award.

The Board further awarded and adjudged that, save and except what was covered by the agreement last referred to, there were no other sums of money payable to the corporation of Port Arthur by the corporation of Fort William for the then present value of the right of operating the railway till the 1st December, 1913.

The Board further awarded that the corporation of Fort William should, within sixty days from the making of the award, pay to the corporation of Port Arthur the sum of \$52,000, and that upon payment thereof the corporation of Fort William should be forthwith entitled to the full and peaceable ownership of the railway within the limits of Fort William, and the appurtenances, rights, etc.

The proceedings in question upon the appeal were begun on the 2nd November, 1908, by a notice given "on behalf of the Joint Commission composed of Messrs. William John Ross, Edward Saunders Rutledge, Hugh O'Leary, J. A. Little, and W. P. Cooke, constituted pursuant to sec. 4 (a) of the agreement set forth in schedule B." to 8 Edw. VII. ch. 80, and also on behalf of the corporation of the city of Fort William, of an application to the Ontario Railway and Municipal Board for an order directing the sheriff of the district of Thunder Bay to place the applicants the Joint Commission in possession of the railway, etc., and to put the Electric Railway Light and Telephone Commissioners out of possession of the same.

This notice was directed to Messrs. W. P. Cooke, James A. Little, John J. Carrick, W. F. Fortune, and George Hodder, Electric Railway Light and Telephone Commissioners of the city of Port Arthur.

It was shewn in support of the application that the \$52,000 had been paid; that the 1st November, 1908, was fixed by the Joint Commission as the time when to take over the operation of the railway; and that possession had been demanded and refused.

The orders appealed against were made pursuant to this notice.

The Court of Appeal on the 17th November, 1908, granted the Electric Railway Light and Telephone Commissioners of the City of Port Arthur leave to appeal from the orders.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 21st and 22nd January, 1909.

C. J. Holman, K.C., for the corporation of the city of Fort William and the Joint Commission, submitted a preliminary objection, that no appeal should be heard at the instance of a board

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of commissioners of the city of Port Arthur, not an incorporated body, and representing only the city corporation.

[The appeal was heard subject to the objection.]

*H. Cassels*, K.C., for the appellants. The Ontario Railway and Municipal Board had no jurisdiction to entertain the application made by the Joint Commission and the corporation of the city of Fort William, or to make the orders complained of. No jurisdiction is conferred in respect of such matters, but only in public matters. The jurisdiction of the Ontario Railway and Municipal Board is defined in secs. 16 and 17 of the Act constituting the Board, 6 Edw. VII. ch. 31. There is nothing in either of these sections which covers the state of facts shewn to exist here. These sections refer to the Ontario Railway Act, 1906, and to the "the special Act;" but, by sec. 2 of 6 Edw. VII. ch. 31, and sec. 2 (1) of the Ontario Railway Act, 1906, "'the special Act' shall be construed to mean any Act authorising the construction of or otherwise specially relating to a railway or street railway, whether operated by steam, electricity, or other motive power, and with which this Act is incorporated." There is no "special Act" affecting the Port Arthur Street Railway with which either ch. 31 or the Railway Act, 1906, is incorporated. The agreement which it is sought to enforce against the appellants is set forth in schedule B. to 8 Edw. VII. ch. 80. The appellants are not parties to that agreement, and there is no privity between them and the Joint Commission or the corporation of Fort William or the corporation of Port Arthur, and there is nothing in that agreement, or the statute validating it, conferring jurisdiction upon the Ontario Railway and Municipal Board, even if that Board had jurisdiction, as between the parties to the agreement, to make any order relative thereto. The appellants have been established and their qualifications and duties have been defined and prescribed by special Acts. They are entitled and bound to comply with the said statutes in managing and looking after the affairs of the railway, and are not in any way made subject to any summary or special jurisdiction such as has been assumed to be exercised. Reference to the following Ontario statutes: 58 Vict. ch. 73; 1 Edw. VII. ch. 65; 3 Edw. VII. ch. 76; 6 Edw. VII. ch. 91; 7 Edw. VII. ch. 83; and to *Hardcastle on Statute Law*, 4th ed. (Craies), pp. 113, 116; *Maxwell on Statutes*, 3rd ed., pp. 113, 178.

*C. A. Moss*, for the respondents the corporation of the city of

Port Arthur, supported the appeal, and asked the Court to disregard the reasons *against* appeal of these respondents, as printed in the appeal case.

*C. J. Holman*, K.C., for the respondents opposing the appeal. The appellants are ratepayers, as commissioners they must be such, and they represent the ratepayers, who are parties to the agreement. Under sec. 16 of 6 Edw. VII. ch. 31, the Ontario Railway and Municipal Board has full jurisdiction if complaint is made by any person interested. It does not matter whether the decision of the Board is right or wrong: *In re Long Point Co. v. Anderson* (1891), 18 A.R. 401, 410. This Court has no right to make any finding of fact inconsistent with the finding of the Board. The Board was entitled to proceed because there was an agreement between the municipal corporation and the commissioners. The municipal corporation is a "company" within the meaning of the Railway Act and of sec. 16 of 6 Edw. VII. ch. 31. Then 8 Edw. VII. ch. 80 declares (sec. 2) that the agreement is binding; and sub-sec. 6 gives the authority to the municipalities. The bargain is between the municipal corporations of Fort William and Port Arthur—the latter being "the company." Each city council appoints two commissioners to form the new board; the fifth member was appointed by the Ontario Railway and Municipal Board. The word "and" in the clause "and with which this Act is incorporated" in sec. 2 (1) of the Ontario Railway Act, 1906, should be read "or." Sections 3, 4, and 5 of that Act make the matter reasonably clear. The Act 8 Edw. VII. ch. 80 is a special Act relating to this particular railway. If the appeal should be allowed, the commission duly appointed would be turned out, and the appellants, who have no interest, would be established.

*Cassels*, in reply. It is a different and distinct railway that the statute mentions. Ownership is spoken of in the statute, but not possession. The appellants are created a board by statute, not by municipal by-law. All that the statute has done is to make it possible to create a new board. The fact that the statute gives power to operate a railway does not create a railway corporation. If the corporation of Port Arthur is a street railway company, how does it affect the appellants? Any person may complain, but there is no complaint against Port Arthur. The statute cannot be construed in that wide way.

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April 5. The judgment of the Court was delivered by MEREDITH, J.A.:—Mr. Cassels's contention, that the policy of the legislation was to confer jurisdiction upon the Board of Commissioners in matters affecting the public only, does not aid his contention that they have exceeded their powers in this case; for the question whether the appellants were usurping the right of control and management of the railway in question was one in which two large municipalities—with possible conflicting interests—and their inhabitants, as well as the public generally, were very materially, if one may not in regard to the municipalities say vitally, interested.

But we need not be troubled with questions of policy if the words of the legislation confer, as they seem to me plainly to do, jurisdiction.

Under the agreement made between the two municipalities and confirmed by legislation—8 Edw. VII. ch. 80 (O.)—one of the municipalities was, on payment of the amount of an award to be made, to become the owner of a part of the railway in question which theretofore had been owned by the other, although operated in both municipalities, and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided for in the legislation and agreement. The award having been made, and the amount awarded having been paid, and the appellants retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Ontario Railway and Municipal Board was applied to, and such compliance was enforced by it.

The one question is whether the Board exceeded its powers.

Under the enactment constituting, and conferring jurisdiction upon, the Board—6 Edw. VII. ch. 31, sec. 16—it was given power to require any company, person, or municipal corporation, to do any act, matter, or thing, required to be done under that Act, "The Ontario Railway Act, 1906," or the special Act, or any agreement entered into by the company with any municipal corporation, and to prohibit the doing, or continuing, any act, matter, or thing, which is contrary to any of the said Acts or any such agreement; and the jurisdiction conferred on the Board was made exclusive, and its decisions upon any question of fact and as to whether any company, municipality, or person is, or is not, a party interested

within the meaning of that section, were declared to be conclusive in all Courts, as well as binding on such parties.

I cannot think that the enactment gives power to the Board to confer upon itself jurisdiction, even as to parties, by a misinterpretation of the law affecting their powers; but rather that, in an emphatic, and possibly a somewhat further-reaching, manner in regard to matters of fact, the ordinary rules which prevail in prohibition proceedings are expressly applied.

By virtue of the interpretation clauses of the first-mentioned enactment, the words "the special Act" include any Act authorising the construction of, or otherwise specifically relating to, a street railway, and with which the Ontario Railway Act, 1906, is incorporated: and under that enactment all Acts relating to street railways within the legislative authority of the Province are in effect incorporated with it, unless expressly excepted: see secs. 3, 4, and 5: and, if anything may be thought to turn upon that subject, under sec. 207 a municipal corporation assuming the ownership of a street railway, and operating the same, shall be deemed a street railway company for all the purposes of that Act.

Then, the special enactment authorising the construction of the railway in question—see 56 Vict. ch. 78 (O.)—and the enactment 8 Edw. VII. ch. 80, in effect amending it, which were not excepted from the provisions of the Ontario Railway Act, 1906, are incorporated with it; and so the enforcement of their provisions, and the forbidding of the doing or continuing of anything contrary to them, rest with the Board.

I cannot think that the fact that the municipality of Port Arthur controlled the railway through commissioners can make any difference: the railway is none the less that of the municipality: see 57 Vict. ch. 57, secs. 4 and 5. It was owned by the municipality; that municipality was to be paid, and was paid, the price which the other municipality was to pay, and did pay, for the interest it acquired in it. The commission was an agency of the municipality for the management of that part of its property.

The action, therefore, of the Board, in preventing the appellants from continuing in the control and management of the railway, contrary to the agreement and contrary to the enactment, was quite within their powers: and the question of fact, whether the time had arrived when the new board of management should

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have such control and management, was one for the Board, and their finding upon it is not only binding upon the parties but also "in all the Courts."

*Appeal dismissed with costs.*

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RE DAVIS.

April 3.

*Infant—Custody—Adoption—Rights of Parent—R.S.O. 1897, ch. 259, sec. 12—“Abandoned”—“Deserted”—Payment for Maintenance.*

The law of this Province knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them.

By R.S.O. 1897, ch. 259, sec. 12, where the parent of any child applies to the Court for an order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to make the order:—

*Held*, that “abandoned” and “deserted” involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care; and leaving a child with those who had contracted to take proper care of it could not be called “abandonment” or “desertion,” nor could the subsequent act of giving up all claim to the child.

Therefore, where the parents of an infant placed her in charge of a stranger, agreeing to pay for her maintenance, and afterwards signed an agreement to give up all claim to the child, an order was made, upon the father’s application, for delivery of the child to him, upon an undertaking to pay to the person who had assumed to adopt the child the expense incurred by that person: R.S.O. 1897, ch. 259, sec. 12 (2).

[APPLICATION was made on the 6th March, 1909, by E. J. Davis and wife, *ex parte*, before MAGEE, J., in Chambers, at London, for an order for a *habeas corpus*, directed to A. J. Boon and wife, to produce the body of the applicants’ infant child Margery Davis. An order was made by MAGEE, J., permitting the applicants, or one of them, to serve notice upon Boon and wife, and providing that, pending the application, the child should not be removed from the city of London. Notice of motion was then served on behalf of E. J. Davis for an order allowing E. J. Davis (father) to issue a writ, pursuant to the statute and rules in that behalf, directed to A. J. Boon and his wife, commanding them to produce the body of the infant and shew by what right or authority they detained her, etc.

The motion was heard by RIDDELL, J., in Chambers, at London, on the 27th March, 1909.

*T. H. Luscombe*, for the applicant, relied on the common law right of the father.

*J. M. McEvoy*, for the respondents, argued that R.S.O. 1897, ch. 259, sec. 12, enabled the Court, in the circumstances, to refuse the application.

April 3. RIDDELL, J.:—To E. J. Davis of London and his wife was born, at that city, in October, 1908, the female child the subject of the present controversy.

Davis was a brakesman, and both he and his wife were in bad health. He was "laid off" from his employment, and, having been promised a place in Detroit, he made up his mind to go there, rather than wait in London in idleness till the spring. His wife had an older child, and did not feel well enough to look after both children; accordingly a temporary home was advertised for (Mrs. Davis's mother was also sick, and the baby could not be left with her). Mrs. Boon, wife of the *chef* at a leading London hotel, answered the advertisement, and an arrangement was made whereby Mrs. Boon was to be paid \$8 per month in advance for care of the child so long as it remained with her. She apparently was also to be paid for clothing, etc., supplied for the child.

Davis and his wife went to Detroit, leaving the infant with Mrs. Boon, who lived with her husband in London.

The money was not paid as agreed, and on the 15th December, 1908, Mrs. Davis wrote Mrs. Boon, saying, "If you want to adopt the baby, we are willing any time;" and, after desiring Mrs. Boon not to mention the matter to a person named in the letter, she concludes by "hoping we shall come to terms." On the 5th January, 1909, she again writes: "There is no need to worry about our delay in settling the matter between us, as we intend giving you the child. . . . He (Mr. Davis) is away in Toledo now, so I can't sign the papers until he comes back, and it may be a couple of weeks or less, but, as soon as he comes back, we will settle things up, so you can rest assured that the baby is yours." She again asks that the person named should not be told about adopting, as that person wanted the baby herself.

On the 28th January, 1909, a document was signed by Davis

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and his wife: "We hereby state that we will give Mr. and Mrs. A. J. Boon our child Margery Davis, born October 15th, 1908, where as we lose all claim of said child." This was sent to Mrs. Boon, with another request not to tell the person referred to—"just tell her, as I did, that we have paid up the baby's board . . . but nothing about adopting; she wants the baby herself if any one can get her."

The Boons have become much attached to the baby, and have treated her well. There is the usual contradiction as to the manner in which she is clothed and looked after generally; it is common knowledge that nurses and women generally cannot be got to agree as to how a child is to be cared for; but, upon all the evidence, I think it fairly clear that the child is doing well.

A short time ago the child was demanded of the Boons by the person whose knowledge of the fact of adoption Mrs. Davis feared, acting for Mr. and Mrs. Davis. The demand was refused; and an application was made before me at the London Weekly Court.

In view of the letters already referred to, it is hard to accept Mrs. Davis's statement that she did not intend to part with the child altogether; and, if it were necessary to determine the fact as to Davis's intention, I should require better evidence than his own affidavit, in which he says that, being sick at the time, he did not read the document, although he signed it, but supposed and "intended and understood that it contained nothing more than an agreement that we would not remove the child until we were ready to pay up all that might be owing." He may have persuaded himself that such was his state of mind; but I should require better evidence than this affidavit to prove the fact.

But is that material?

Admitting that it was the intention of all parties that the father and mother should give up the child to the Boons, what follows?

Under the civil law, as is well known, adoption, with its fictions more or less curious and interesting, played a conspicuous part, but "the law of England, strictly speaking, knows nothing of adoption:" Eversley on Domestic Relations, 3rd ed., p. 514; *Blayborough v. Brantford Gas Co.* (1909), *ante* 243. "By the common law of England the father has the right to the custody of his infant children as against third parties:" Eversley, p. 511.

And "parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them:" p. 513.

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No doubt has been attempted to be cast upon these propositions; but it is argued that the statutory provisions do or may prevent an order for the delivery of the child to the parents now asking for it. R.S.O. 1897, ch. 259, sec. 12, provides that "where the parent of a child applies to any court . . . for . . . an order for the production of the child, and the court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child, the court may, in its discretion, decline to . . . make the order."

This Act is based upon the Imperial Act of 1891, 54 Vict. ch. 3, "Custody of Children Act, 1891," but does not very much assist in this case.

I think "abandon" and "desert" must, in this legislation, involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care. Leaving the child with those who had contracted to take proper care of it cannot fairly be called abandonment or desertion—and the further and subsequent act of giving up all claim to the child, is not, I think, an abandonment or desertion within the Act. The act to be relied upon must be such as indicates such disregard of the welfare of the infant as would shew the parent to be unfit to have it given again into his charge. And I cannot say that there is anything in the conduct of this father shewing him to be unfit to take charge of the infant.

But "the child is being brought up by another person," and an order should be made for the payment by the parent, under R.S.O. 1897, ch. 259, sec. 12 (2), of the sum of \$90, properly incurred by Mrs. Boon in bringing up the child.

Counsel for the application having undertaken at the hearing to pay this sum, an order may go for possession of the child to be given to Davis, or to some person to be named by him.

## [IN THE COURT OF APPEAL.]

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CARPENTER V. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

1908

June 30.

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April 5.

*Accident Insurance—Construction of Policy—Contract for one Year—Continuation or Renewal—Period of Grace—Ontario Insurance Act, sec. 148, (1)—Authority of Agent.*

Section 148 (1) of the Insurance Act, R.S.O. 1897, ch. 203, is not applicable to a contract of insurance which the assured has no right to continue or renew without the consent of the insurers; it merely makes uniform and extends the commonly contracted-for grace given to the assured to renew, after forfeiture or default, a contract renewable, or not, at his will.

In this case a policy of accident insurance was considered, having regard to its provisions, to be a contract for one year only, and one which could be continued or renewed only by mutual consent; and it was *held*, that there was no such continuation or renewal, although the agent of the insurers had, after the expiry of the year, and after an accident had happened to the assured, from the effects of which he died two weeks later, accepted from the assured a promissory note for the renewal premium and delivered to him or the beneficiary a renewal receipt which had been intrusted to the agent by the insurers, but not for such purpose.

ACTION by Annie Carpenter, the beneficiary named in a policy of insurance issued by the defendants, to recover the amount of the insurance. The policy was issued to Philip Carpenter, of Cornwall, deceased, under date the 20th August, 1906, purporting to insure him against accident for a term of twelve months from noon of the 2nd August, 1906, in consideration of the statements, etc., in the application for the policy, and of an annual premium of \$10. The first premium was duly paid and the policy delivered. The facts are stated below.

The action was tried before LATCHFORD, J., without a jury, at Cornwall, on the 23rd June, 1908.

G. F. Henderson, K.C., for the plaintiff.

A. W. Fraser, K.C., for the defendants.

June 30. LATCHFORD, J.:—Prior to the 2nd August, 1907, the defendants sent to F. G. Adams, their district agent at Cornwall, a renewal receipt No. 81226. The agent had, prior to that date, two interviews with Carpenter regarding the renewal. At the first Carpenter said he did not know whether he could renew the policy or not, and, while nothing definite was settled at the second interview, Adams deposed that Carpenter was then favourably inclined to renew the policy.

On the 5th August Carpenter met with an accidental injury,

which resulted, it is admitted, in his death two weeks later. Indeed the formal proofs of death filed with the company are not disputed. The agent saw Carpenter after the accident on the same day, and again on the following day, when Carpenter gave the agent in payment of the premium a promissory note for \$12.50, which the agent discounted, using the proceeds for his own purposes or the purposes of the company. The note was paid at maturity.

As the injury was to Carpenter's right hand, he was unable to sign the note with his own hand. The evidence is clear, however, that he authorised Adams to sign the note for him, and the note is, no doubt, the note of the deceased. From a statutory declaration filed by Adams as part of the proofs of death, it would appear that the renewal receipt was delivered on the 2nd August. But at the trial Adams deposed that he did not remember when he delivered the renewal receipt. He thought it was after the accident. There is a good deal of confusion in the evidence of the plaintiff, both at the trial and upon her examination for discovery, as to the time when the renewal receipt was actually delivered. Upon her examination for discovery, Miss Carpenter evidently confounded the receipt given to her when the note was paid with the renewal receipt. A fair inference from the evidence is that the renewal receipt was not delivered until after the accident, and probably not until a few days after the death of the assured. It was certainly paid in less than thirty days after the 2nd August.

It is contended by the company that the renewal premium was never paid, inasmuch as a promissory note was given to the agent and not a cash payment, and the agent had no authority to accept a note in payment. The agent, however, by discounting the note, treated it as cash, as he had the right to do, subject only, as between himself and the company, to his liability to pay the company the premium, or such part of it as the company were entitled to, after allowing the agent his commission.

The main defence of the company rests upon two grounds. The first is that the term for which the deceased was insured expired at noon on the 2nd August, 1907, and no new contract was made prior to the accident. The second is that the policy was granted upon the express condition that any renewal was not to take effect, although delivered to the insured, unless the insured, prior to the happening of the accident under which claim is made,

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has actually paid the premium for the renewal. Such a condition is embodied in the policy.

The plaintiff's reply to this defence is, that sec. 148 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, gave the right to the deceased to pay his renewal premium at any time within thirty days after the 2nd August, 1907, the first day on which the renewal premium was due.

The company contend that this section has no application to accident insurance, and rely on the decisions in *Neil v. Union Mutual Life Insurance Co.* (1882), 7 A.R. 171; *Manufacturers' Life Insurance Co. v. Gordon* (1893), 20 A.R. 309; and *Tiernan v. People's Life Insurance Co.* (1896), 23 A.R. 342. But these decisions were prior to the enactment of sec. 148, which, as it now stands, dates only from 1897.

*Long v. Ancient Order of United Workmen* (1898), 25 A.R. 147, though before the Court of Appeal in 1898, was concerned with a death occurring prior to 1897. Section 148 (1) provides that in any insurance of the person (and "insurance of the person" is interpreted, sec. 2, sub-sec. 46, to include "insurance against death, . . . casualty, accident . . .") where the money payable by way of premiums (not being the initial premiums) under any contract whatsoever is unpaid, the assured may, within thirty days from and including the first day on which the money is due, pay to the company or the company's authorised agent the sum in default. On payment, the contract shall be deemed *ipso facto* to be revived or renewed, and any stipulation or agreement to the contrary shall, as against the assured or his beneficiaries, be utterly void. This enactment completely nullified the condition indorsed upon the policy, and enabled the assured to revive or renew the contract by paying, as he did pay, to the defendants' agent the renewal premium within thirty days after the 2nd August, 1907.

It was argued by Mr. Henderson that the plaintiff is entitled to succeed apart altogether from sec. 148. In view, however, of the conclusion I have reached, it is not necessary to consider this phase of the case.

I consider that the original contract was revived under sec. 148 of the Ontario Insurance Act, by the payment of the renewal premium within the time limited by the section referred to. The plaintiff is, accordingly, entitled to recover the \$1,000 payable to

her by the policy, with interest from the 3rd October, 1907, and costs.

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The defendants appealed from this judgment (by consent) directly to the Court of Appeal, and their appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 20th January, 1909.

G. F. Shepley, K.C., and A. W. Fraser, K.C., for the defendants.

The point is whether or not the section of the statute which gives thirty days to the insured or beneficiary to renew a policy is applicable to a term policy—renewable in a sense, no doubt. It was an insurance for twelve months only, to the 2nd August, 1907. The renewal was by a promissory note taken after the accident. Adams, the agent of the defendants, was friendly to the assured, and in fact deceived the defendants. The note was paid at maturity, after the man's death. The section relied on by the Judge at the trial is sec. 148 (1) of the Insurance Act, R.S.O. 1897, ch. 203; but that is not applicable to this contract; it applies only to what may be called a "continuing contract," that is, a contract under which the insured becomes liable to pay a number of premiums, the statute providing relief in case of default in making punctual payment of one of a series of payments. If any contract was made by the payment and acceptance of a second premium, it was a new contract upon the terms of the old one. The precise point was decided in *Stokell v. Heywood*, [1897] 1 Ch. 459. See, also, *Long v. Ancient Order of United Workmen*, 25 A.R. 147; *Village of London West v. London Guarantee and Accident Co.* (1895), 26 O.R. 520; May on Insurance, 4th ed., sec. 70 a; *Manufacturers' Life Insurance Co. v. Gordon*, 20 A.R. 309; *Tattersall v. People's Life Insurance Co.* (1905), 9 O.L.R. 611, 11 O.L.R. 326; *S.C., sub nom. People's Life Insurance Co. v. Tattersall* (1906), 37 S.C.R. 690. The defendants could have said "no" if the assured offered to renew. The conditions are somewhat carelessly drawn, but the meaning is plain, and, if a new contract was made, it was subject to the proviso as to actual payment of the premium.

G. F. Henderson, K.C., for the plaintiff. It is clear that the intention of the parties, gathered from the face of the document, was that the policy should be renewed from year to year by the payment of the annual premium—"annual" being the word used

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in the policy. The renewal receipt given to the assured purported to continue the policy in force for a further twelve months. Section 148 (1) provides that, upon payment of the premium within thirty days from its due date," the contract shall be deemed to have been *ipso facto* revived or renewed." If the contract had ceased to exist, it was revived. If it merely required to be renewed, the Act renewed it on payment of the premium. The same section provides that "any stipulation or agreement to the contrary shall, as against the assured or his beneficiaries, be utterly void." The defendants' own contract speaks of a renewal payment, and only by converting it into an initial payment can it be taken out of the section. See *Hodgins on Life Insurance*, pp. 22, 29, 40, 41; *Long v. Ancient Order of United Workmen*, 25 A.R. 147. The fact that the accident occurred before actual payment of the premium is immaterial: *Tattersall v. People's Life Insurance Co.*, 9 O.L.R. 611, 11 O.L.R. 326; *People's Life Insurance Co. v. Tattersall*, 37 S.C.R. 690; *Stuart v. Freeman*, [1903] 1 K.B. 47. The payment relates back to the day of the expiry, no matter what has happened in the meantime. No fraud is charged against the assured or the plaintiff. The statute gives the payment the same effect as if it was made on the 2nd August; that is the effect of the two cases last cited. See *Carter v. Brooklyn Life Insurance Co.* (1888), 110 N.Y. 15, as to the meaning of "renewed." As to the agent's authority with regard to the premium, see *May on Insurance*, 4th ed., secs. 135, 136; and sec. 360 as to waiver by the conduct of the parties.

*Shepley*, in reply. It is not important to know when, having regard to the date of the death, delivery of the receipt took place; clearly it was after the injury. It is not possible to say that Adams paid the premium. The whole matter comes down to a question of construction of the contract.

April 5. The judgment of the Court was delivered by MERE-DITH, J.A.:—Unless the contract of insurance in question was one which the insured had a right to continue or renew, the provisions of the enactment given effect to by the trial Judge in this case cannot be applicable. It does not, and could never have been intended to, give one party to a contract the right to compel the other party to it to enter into a new contract of the same, or any

other, character, against his will. It does, and was intended to, make uniform and extend the commonly contracted-for grace which was given to the insured to renew, after forfeiture or default, a contract renewable, or not, at his will.

It was, therefore, necessary for the plaintiff to prove a contract renewable at his instance, without the consent of the insurer, to bring the case within the enactment applied to it. That, in my opinion, she has failed to do. There are, no doubt, some expressions in the body of, as well as indorsed upon, the contract which, at first sight, look the other way;\* but, when it is borne in mind that such contracts can be, and very frequently are, carried on, or renewed, by mutual consent, the purposes of such expressions become apparent. And indeed there does not seem to be anything superfluous in them. On the other hand, the absence of such provisions as the usual one for forfeiture in default of payment of premiums, makes it still more plain that the contract was for one year only, and one which could be continued, or renewed, only by mutual consent. "Accident" insurance is obviously different in this respect from "life" insurance; in the former the contract is frequently for a journey, a day, a few days, or a month, or other definitely fixed period, the latter is generally for life, if the insurer chooses to continue it; so that the proper inferences to be drawn may be different; but the

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\* The contract was in part as follows: "The Canadian Railway Accident Insurance Company, Ottawa, Can., in consideration of the statements, agreements, and warranties in the application for this policy and of the annual premium of the sum of ten dollars payable . . . in advance, does hereby insure Philip Carpenter, of Cornwall, county of Stormont, Province of Ontario, under classification medium (being a carpenter, shop or bench work only, by occupation) for a term of twelve months from noon of August 2nd, 1906, against bodily injuries caused solely by external violent and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained), as follows: The principal sum of this policy is one thousand dollars. In event of death, the principal sum shall be paid to Annie Carpenter, sister (the beneficiary), if surviving, or in the event of her prior death to the legal representatives or assigns of the insured.

(Here followed the schedule of indemnities.)

"Provided always and this policy is granted upon the following express conditions, which shall be precedent to the right of the insured to recover under this policy:—

"1st. That this policy, or any renewal thereof, is not to take effect, although delivered to the insured, unless and until the said insured, prior to the happening or occurring of an accident under which claim is made, has actually paid the premium for the said policy or any renewal thereof.

"2nd. The company may cancel this policy at any time by giving notice made to address of insured . . .

"5th. This insurance will not be renewed after the insured has attained the age of sixty-five (65) years."



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provisions of the Act are as much applicable to the one as the other, provided, of course, that they are so renewable.

Then was there such a renewal? The insurers were willing and anxious to renew: the insured was not willing, before the accident, and was doubtful even after that until persuaded by the company's agent. Had the insurers known the facts, it is very obvious that they would not have continued, or renewed, the insurance—surely would not have assumed liability for an injury already sustained and a cause of action already arisen. They were not liable, in any sense, for the injury sustained after the termination of the contract; nor would they be liable under the new contract unless it were given a retrospective effect. The only possible ground for giving such effect to it would be pure charity, or else a legal right to a renewal, which latter, as I have said, did not exist. The renewal receipt, given by the agent under these circumstances, was given without authority. He was not intrusted with the receipt for any such purpose. The agent had neither actual nor ostensible authority to so renew; and, even if he had, the evidence does not prove payment of the premium to the insurers before repudiation, or indeed at any time.

The appeal must be allowed.

E. B. B.

## [DIVISIONAL COURT.]

## LEHMAN V. KESTER.

D. C.

1909

Jan. 20

May 6.

*Release—Validity—Judgment against Defendant in Action for Seduction—Pending Appeal—Consideration—Agreement to Pay Costs—Religious Influence Exercised by Strangers to Defendant—"Undue Influence"—Verdict of Jury—Motion to Set aside.*

The plaintiff, having obtained a verdict and judgment for \$1,200 against the defendant in an action for seduction of the plaintiff's daughter, while an appeal by the defendant from the judgment was pending, executed a release of the judgment, upon the defendant paying the plaintiff's costs of the action. The plaintiff was induced to do this by the persuasions of the bishop, and one H., a member, of the congregation of a church to which the plaintiff belonged, and by their threats that, unless he made a settlement of the action, he would be expelled from the church, the tenets of which forbade the members to go to law. The bishop and H. acted in good faith, from religious motives, and were not in any sense agents of the defendant. The principal object of the plaintiff in bringing the action was to secure maintenance for his daughter's child, and H. promised that the child would be cared for:—

*Held*, that, the consideration for the release being substantial, and the influence to obtain it having been exercised without the defendant's knowledge or procurement, and for a purpose entirely foreign to him, the release was binding on the plaintiff, even though the spiritual influence exercised was "undue influence," which was doubtful.

Judgment of MACMAHON, J., upon the trial of an issue as to the validity of the release, reversed.

A motion by the defendant to set aside the verdict, and judgment for \$1,200 and for a new trial, was dismissed, there being evidence which, if believed by the jury, justified the verdict.

THIS was an action for the seduction of the plaintiff's daughter, tried before MAGEE, J., and a jury, at Toronto, on the 30th September, 1908, when a verdict was given and judgment entered for the plaintiff for \$1,200.

The defendant served notice of an appeal to a Divisional Court, but while the motion was pending the plaintiff signed a release of the judgment. Upon the appeal coming before a Divisional Court on the 26th November, 1908, an order was made directing the trial of an issue to determine the validity of the release.

The issue was tried before MACMAHON, J., without a jury, at Toronto, on the 15th January, 1909.

*J. M. Godfrey*, for the plaintiff.

*J. W. Curry*, K.C., for the defendant.

January 20. MACMAHON, J.:—This is an issue directed by a Divisional Court to be tried to determine the validity of a release from a verdict obtained by the plaintiff against the defendant.

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The action of *Lehman v. Kester*, for the seduction of the plaintiff's daughter, was tried on the 30th September, 1908, and Lehman obtained a verdict for \$1,200. On the morning of Sunday the 8th November, while an appeal from the verdict was pending in the Divisional Court, Hoover met the plaintiff in the Mennonite church in the locality where they lived, and I accept Hoover's evidence as to what the plaintiff then said. The plaintiff stated "he was sorry for what he had done, and, if Mr. Wideman (the bishop of the church) came over to the church in two weeks, he would make a confession to the church; that he had been misled by others."

Hoover and Bishop Wideman did not wait for the two weeks to elapse to meet the plaintiff at the church, but on the 16th November drove to the plaintiff's house, when the bishop asked the plaintiff if he was going to make a confession to the church. The reply he received from the plaintiff was "No," and the plaintiff told Bishop Wideman to take his name off the church's books. Hoover then told the plaintiff he had expelled himself from the church by taking proceedings in a court of law. And Bishop Wideman then said to the plaintiff that if he did not make a confession he would be expelled from the church.

While the plaintiff was in a repentant mood on the 8th when he spoke to Hoover, on the 16th he was not so repentant or submissive until he was told by the bishop that he would be expelled, unless he went with them to Kester's.

Hoover then asked the plaintiff if he would drop the judgment, and he demurred, saying he had nothing with which to support the child. Hoover replied that the child would be taken care of. Bishop Wideman asked the plaintiff if he would not drop the judgment if Kester paid the costs. The plaintiff did not believe that Kester would pay them, and the bishop then said if Kester would not pay he would. Hoover said, "Come and see Kester and hear what he says." Bishop Wideman, Hoover, and the plaintiff then started to drive to Kester's. When three-quarters of a mile from the plaintiff's house, the plaintiff wanted to get out of the vehicle and return home. Hoover said he told him to remain quiet in his seat. When they arrived at Kester's (the plaintiff then being virtually in charge of and under the control of the bishop and Hoover), Bishop Wideman asked Kester whether, if the plaintiff would drop the judgment, he (Kester) would pay the costs; and

Kester said "Yes." Bishop Wideman said Kester then spoke about a release from the judgment. A discussion then took place as to who should draw the release, and the plaintiff stated that it should be drawn by some disinterested person, and Kester suggested that Mr. McCullough, a solicitor in Stouffville, should draw it, and Hoover, the plaintiff, and Kester went to Mr. McCullough's house; and Mr. McCullough said he received instructions from Kester and the plaintiff to draw the release, and when prepared he said he explained to the plaintiff that he was releasing the judgment, and Kester was to pay the costs of the plaintiff's solicitor and his own costs. Mr. McCullough said the plaintiff executed the release without any intimation that he did not desire to execute it. According to Mr. McCullough, he was executing it of his free will.

The plaintiff is sixty-two years old, a cripple from his youth, not strong physically, and of a somewhat nervous temperament, and I find was induced to execute the release by reason of the threat used by Bishop Wideman of expulsion from the church. Neither the bishop nor Hoover was satisfied with a mere confession to the congregation; both seemed to be bent on a release of the verdict being given to Kester; and the bishop went so far as to promise that, if the plaintiff released Kester from the judgment, he would become personally responsible for the payment to the plaintiff's solicitors of their costs.

The case is somewhat different from any case to which I have been referred. Neither of the parties exercising influence over the plaintiff were beneficiaries in any way; but that does not, in my opinion, prevent the transaction from coming under the rule that where undue influence has been exercised in obtaining a benefit, even if the benefit results to a third person, the impeached transaction cannot stand.

The rule is shortly stated in Snell's Equity, 15th ed., p. 454: "The law requiring that there shall be free and full consent to bind the parties—such consent supposing three things, namely, a physical power, a moral power, and a free exercise of these powers—it follows that if either of two powers is defective (or if the exercise of either is hindered) the act is not binding."

Lord Justice Lindley, in *Allcard v. Skinner* (1887), 36 Ch.D. 145, at pp. 182-3, said: "Nor can I find any authority which actually covers the present case. But it does not follow that it is

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not reached by the principle on which the Court has proceeded in dealing with the cases which have already called for decision. They illustrate but do not limit the principle applied to them . . . What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. . . . As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-existence, and, failing that proof, have set aside gifts otherwise unimpeachable."

On cross-examination, Bishop Wideman, in answer to Mr. Godfrey, said:—

"Q. And you and Mr. Hoover went there for the purpose of inducing him to drop this judgment against Kester? A. I went there moved by the spirit.

"Q. For that purpose? A. Yes."

Although, when the parties went to Mr. McCullough's house, the plaintiff was consulted about the release which was to be prepared, he was acting from the fear—loss of moral power—engendered by Bishop Wideman's threat that he would be expelled from the church unless a release to Kester of the judgment was executed by the plaintiff.

I think the plaintiff should have been permitted to see his solic-

itor before being taken to Kester's, as he was virtually giving Kester the \$1,200 judgment recovered against him.

I find that the release was executed by the plaintiff without the advice of his solicitor and under the undue influence of Bishop Wideman and Mr. Hoover, and is not a valid release of the judgment.

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The defendant appealed from the judgment of MAGEE, J., at the trial of the action, and also from the judgment of MACMAHON, J., upon the trial of the issue, and both appeals were heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 2nd March, 1909.

*J. W. Curry*, K.C., and *C. R. Fitch*, for the defendant. There was a consideration for the release of the judgment, because there was an appeal pending. The influence exercised upon the plaintiff was by strangers; that does not come within the case cited by MacMahon, J., nor within any of the authorities. The damages given at the trial of the action were excessive, and the verdict was against the weight of evidence; there should be a new trial.

*J. M. Godfrey* and *T. N. Phelan*, for the plaintiff. Where a man denudes himself of a large portion of his property under spiritual advice, the transaction cannot stand, unless he has competent independent advice. In this case there was not only religious influence, but also actual physical force. *Allcard v. Skinner*, 36 Ch.D. 145, is the leading case; see p. 159. See also *Liles v. Terry*, [1895] 2 Q.B. 679; *Mason v. Seney* (1865), 11 Gr. 447, 12 Gr. 143; *Cox v. Adams* (1904), 35 S.C.R. 393; *Stuart v. Bank of Montreal* (1908), 17 O.L.R. 436.

[FALCONBRIDGE, C.J.:—We need not hear you on the seduction verdict. We all think there can be no interference with that.]

*Curry*, in reply.

May 6. BRITTON, J.:—This case presents some difficulty, both as to law and fact. The undisputed facts are that the plaintiff, a man sixty-two years of age and "crippled up" since he was six years old, had brought an action for the seduction of his daughter, and recovered a verdict against the defendant for \$1,200. This daughter had given birth to a child prior to the one the paternity of which was charged against the defendant.

The defendant, who is a married man, stoutly from the first

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denied the charge and asserted his innocence, and he lodged an appeal against the judgment of \$1,200 recovered.

The plaintiff was a member of the Mennonite church and had been so for over twenty-six years, and he knew that one of the rules of that body was that no member should go to law with any person, and that a violation of that rule might lead to expulsion from the church. The "bishop" of the plaintiff's church is Samuel Wideman, whom the plaintiff knew well, and had known for many years, and particularly for the six years or more of Wideman's tenure of office.

It does not appear just when the law suit against the defendant came to the knowledge of the bishop, but he knew of it before the trial and a considerable time prior to the 8th November last.

The plaintiff had been caretaker of the church building; he had been asked to give up the keys, and he had given them up; and on the last mentioned date Isaiah Hoover, another member, had the keys and opened up and started a fire for the service in the church on that day. No action looking to the expulsion of the plaintiff had been taken, and the plaintiff says he knew that, before he could be expelled, there would have to be a majority of the members of the church against him. Before the service at the church began, the plaintiff said to Hoover that he was sorry for what he had done, that he was sorry for starting the suit against the defendant, and the plaintiff then asked Hoover to ask Bishop Wideman to meet the plaintiff at the church on the 22nd (two weeks from that day), and at that time, "if the thing was settled," if the law suit was settled, he (the plaintiff) would get up in the church and either admit that he had done wrong or submit to expulsion.

I understand from the plaintiff's evidence and from this voluntary statement to Hoover that he, the plaintiff, desired a settlement and expected one would be had, and if so he would admit he had done wrong and ask forgiveness, but if no settlement was arrived at, he would submit to expulsion.

The plaintiff was friendly to Hoover, and Hoover was a friend of the defendant. Hoover was simply a member, holding no official position in the church, and the defendant was not a member. Hoover was not, so far as appears, then in a position to exercise, and did not attempt to exercise, any influence over the plaintiff,

and the conversation was in the absence of Bishop Wideman. The plaintiff was then seriously considering and deliberating upon a settlement for the sake of being at peace with the defendant and having the forgiveness of the members of the church because of his violation of one of its well-known rules. This presupposes that any settlement, if one could be made, must be before the meeting when the plaintiff would speak to the congregation. This conversation was communicated by Hoover to Wideman, and on the 16th November they went to the plaintiff's house. The plaintiff says their visit was to get him to go to the defendant's house and ask his forgiveness. That would be of no use unless there was to be a settlement. It was evidently regarded by all, at that time, as preliminary to and part of the settlement, and no one can doubt from the evidence of the plaintiff that he so understood it, and that he was acting in line with his first conversation with Hoover.

The learned trial Judge finds that at the defendant's house and when the settlement was agreed upon, and when the plaintiff was at McCullough's, and when McCullough was consulted about the release which was to be prepared, the plaintiff "was acting from the fear—loss of moral power—engendered by Bishop Wideman's threat that he would be expelled from the church unless a release to Kester of the judgment was executed by the plaintiff."

The plaintiff appeared to have been acting upon his own opinion at Kester's house. It is stated that as soon as a settlement was agreed on, the discussion arose as to who would prepare the release. The plaintiff said it should be drawn by some disinterested person, and the defendant suggested Mr. McCullough. Mr. McCullough was in fact a disinterested person, known to both parties, honest and capable, and he drew what the plaintiff desired and what the plaintiff fully understood. The plaintiff admits that it was read over to him and that he fully understood it.

Can it be said then upon the undisputed facts, and as found by the learned Judge, that his conclusion is the correct one, that the release was executed so under the influence of Wideman and Hoover as to render it invalid against the defendant?

The defendant from first to last had asserted his innocence of the seduction charge and defended the action. The verdict had gone against him, but he had lodged an appeal, which he intended to prosecute. There is no evidence of any scheming or working

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on the defendant's part to bring about a settlement. He was willing, no doubt anxious, to settle on terms of paying the plaintiff's costs, if the plaintiff would release him from payment of the \$1,200. It was not a gift by the plaintiff to the defendant of that amount, or in fact of anything. It is fair to say that the chances of holding his verdict were in the plaintiff's favour, and he was giving up these chances for the sake of a reconciliation with the defendant, being at peace with the church of his choice, one of the rules of which church he had broken, getting costs for which he was liable paid, and a vague and somewhat indefinite promise that the child would be provided for.

This is not a case where the plaintiff can complain that he had not the advice of his solicitor. He does not say that he was ignorant, and he was not in fact ignorant, of the effect of what he was doing. He may have acted at a time when thinking more of his church relations than before or after. He may have thought less of the money represented by the verdict, as compared with what he was getting, or less of his chance of holding his verdict, than another would, but he was in a position to consider all these things, and he fairly contracted with the defendant.

This case is quite different in its facts, both as to the influence and the voluntary gifts made, from the cited case of *Allcard v. Skinner*, 36 Ch.D. 145. See *Bainbridge v. Browne* (1881), 18 Ch.D. 188. The latter is commented on and considered in *Chaplin & Co. Limited v. Brammall*, [1908] 1 K.B. 233.

It cannot be said to be "undue influence" where it is merely stating by a person in authority the effect of a law or of a rule of the church or society to which both belong and both are bound to conform.

There was not, either by Wideman or Hoover, the exercise of any real or apparent confidence or authority for the purpose of obtaining an unfair advantage of the plaintiff's weakness of mind or his necessities or distress. No person should be allowed to keep an advantage obtained by the fraud of another. There is here a complete absence of fraud, either misrepresentation or concealment. There is here just the statement by a person or persons in authority in the church to a member of the same communion, that he must choose between the inside and outside.

If, as in this case, the choice involves a contract with an outside

individual, as the defendant is, he having been guilty of no fraud, but contracting in good faith, the contract, in my opinion, should stand.

The appeal should be allowed, and the settlement should be affirmed. As to costs, each party should pay his own costs of the present attempt to enforce the settlement. The points are in some respects new.

The defendant's motion to set aside the verdict in the main action should be dismissed without costs.

RIDDELL, J.:—The plaintiff is a member of the Mennonite church: one of the tenets of that church is that the members must not go to law; indeed it is said that going to law will, according to the creed of this body, imperil the soul of the man so offending.

The plaintiff brought an action for seduction against the defendant, who is not a Mennonite. The bishop of the plaintiff's church, Mr. Wideman, met the plaintiff before the action came on for trial, and told him "that the Bible teaches in opposite direction from that;" beyond question the bishop really was anxious about the soul of this erring member of his flock, and was desirous of persuading him from a course which, according to his creed, was fraught with fearful danger. The plaintiff made some excuse about an appointment, and the desire of his spiritual friend was not gratified. The action proceeded; and it resulted in a verdict for \$1,200.

The defendant was not satisfied with this result, and caused to be served a notice of motion by way of appeal to a Divisional Court. Pending this appeal, a settlement of the action was arrived at through the intervention of Mr. Wideman and another member of the Mennonite body, Mr. Hoover; the validity of this settlement being challenged by the plaintiff, an issue was directed; the issue was tried by my brother MacMahon at the Toronto sittings in January last, and judgment was given in favour of the plaintiff. The defendant appealed from this judgment, as well as from the judgment after the trial of the action; and both appeals came on before us on the 2nd March, 1909. Upon the hearing we decided that, consistently with the rules governing jury trials, we could not interfere. It may well be that great injustice was done by the jury against the defendant; but the case

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was left to them fairly, and there was evidence which, if believed, would justify them in finding as they did.

In respect to the settlement, the facts are that the plaintiff, who had been caretaker of the church, and who had of his own motion given up the keys a few days before, came on the 8th November to the church, at which was present Mr. Hoover, who seems to be a prominent member of the church. This was on a Sunday. The plaintiff went to his seat in the church, called Hoover over to him, and said: "I am sorry for all I have done; if you see Samuel Wideman, tell him to come over in two weeks, and I will confess to the church that I have done wrong, if the Lord lets me live; I have been misled by others." The plaintiff says that he added "if the thing was settled;" but this the witness Hoover denies, and the learned Judge fully accepts Hoover's account.

Wideman and Hoover went to the plaintiff's place on the 16th November. No imputation is made against Hoover or the bishop of any desire on their part for anything but the salvation of the soul of the plaintiff. They were in no way acting as agents for the defendant; and it cannot be contended—and it is not—that they had any intent or desire to benefit any one else. The defendant had, a few days before, seen Hoover, as he had heard that the plaintiff was going to make a confession, the church had told him that he was ready to make a confession, and the defendant said he came to find out the nature of the apology. The defendant has insisted throughout on his innocence.

According to the story of the plaintiff, Wideman and Hoover threatened to expel him from the church if he did not go to the defendant and ask his forgiveness, saying "You know the church rule." In addition to the apology to the defendant, he says they wanted him to go before the congregation and say that he had done wrong, and said that if he did not do so they would expel him from the church; they thought he had done wrong in bringing the action because it was against the rules of the church.

This was no new experience for the plaintiff; on a previous occasion the same daughter had had a child, and Wideman had at that time threatened the plaintiff that, if he went to law, he would be expelled from the church. An action was not brought on that occasion. Upon the present occasion there is a little conflict as to the part taken by each; but I do not think anything

turns on this conflict. It seems quite clear that the brethren who were reasoning with the plaintiff were doing so solely for the sake of his soul's salvation, that they, as well as he, knew that it was necessary that the plaintiff should apologise to the defendant and give up the judgment he had obtained before he could be in good standing, and that all three were convinced that reconciliation with the church was needed through a confession of his sin and an abandonment of the results of it, before he could, according to the belief which they had in common, be safe from eternal punishment. No temporal advantage to any one, and certainly not to the church or any one connected with it, was in the mind of any person taking part in this interview—it was just faithful brethren striving with an erring brother and earnestly endeavouring to bring him back to the truth. The fear that the plaintiff would not have money to keep the illegitimate child was met by the statement of Hoover that the child would be taken care of; and the fear that the defendant would not pay the costs was met by the bishop undertaking that if the defendant did not pay the costs he himself would. No doubt, in much of this, one having no knowledge of the methods of certain religious bodies might be tempted to suspect indirect motive; but I venture to think that all that took place was wholly natural, and precisely what might be expected in such a religious body as this; and, as I have said, no attack is made upon the good faith and perfect candour and honesty of either bishop or Hoover.

In the result, the plaintiff is brought to a sense of his sin, and agrees to give up his ill-gotten gains; the defendant at first refuses to settle without an apology from daughter and father who have wronged him so, as he asserts, and as, were it not for the finding of the jury, I should be inclined to think they had. A solicitor who has not acted for either party in the action is seen, and the plaintiff abandons his judgment; the defendant, having received the apology of the plaintiff alone, is content with that—the daughter not being a member of the church—and agrees to drop his appeal and pay the costs.

No influence was exercised over the plaintiff other than that necessarily following from the fear of losing his church connection and the eternal consequences of his sin; and no benefit was obtained, desired, or expected by the bishop or Hoover or the church or any one connected with it.

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I do not think it necessary to enter into an inquiry as to the circumstances in which the plaintiff rued what he had done, or the cause of his relapse into the wrong path. If he has the right to repudiate the settlement, or if he has not, the motive is immaterial.

If this were the case of a gift, the fact that the plaintiff was wholly innocent and even ignorant of the influence exercised would be immaterial: *Allcard v. Skinner*, 36 Ch.D. 145, and cases there cited.

This is not wholly a gift. No doubt, the plaintiff was giving up something to which we have held he was entitled. But no one could be sure that the judgment of a Divisional Court would be in that sense, and no one can say what view an appellate Court would take of our decision.

The plaintiff was getting an agreement that his costs would be paid—which indeed he was as certain of under the judgment if not reversed—he was obtaining freedom from the fear that he might himself have to pay costs of a successful appeal—and, in addition, he had obtained the assurance, probably enforceable, that the child would be taken care of. It would seem that the object of the action was largely to procure maintenance for the child. Practically all the judgment could give him was assured to him—the consideration for his release was substantial—and the simple question is, “Is the defendant to be prejudiced by the fact that, without his knowledge and without his procurement, and for a purpose entirely foreign to him, the plaintiff had been induced to enter into this contract by undue spiritual influence?”

One of the greatest masters of our law, in one of his most noted judgments (Mr. Justice Buller in *Master v. Miller* (1791-3), 4 T.R. 320, 2 H.Bl. 140, 1 Anst. 225, 1 Sm. L.C., 11th ed., 767, at p. 786 of the last named report), says: “It is a common saying in our law books, that *fraud vitiates everything*. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle . . . is always applied *ad hominem*. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded on fraud be questioned between the parties to that contract, I agree that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall

overturn a fair and *bonâ fide* contract between two others." This principle I do not find questioned in any case; it is common sense, and, in my judgment, good law. No finding against the good faith of the defendant has been made, and none should be made, notwithstanding the finding of the jury. Good faith being supposed, the contract cannot, in my judgment, be said to be unfair—so that, even if this were a case of fraud, the contract should not be declared void.

In the case of undue influence, which may be defined, after Holland (*Jurisprudence*, p. 239), as consisting of "acts which though not fraudulent amount to an abuse of the power which circumstances have given to the will of one individual over that of another," the rule cannot be more stringent than in a case of express fraud.

Pollock (*Contract*, 7th ed., p. 638) says: "It appears to be at least doubtful whether a contract can be set aside on the ground of influence exerted on one of the parties by a stranger to the contract who did not expect to derive any benefit from it." And, after citing *Bentley v. Mackay* (1862), 31 Beav. 143, 151, he says (note 2): "On principle the answer should clearly be in the negative." I agree with the learned author as to principle, and, not finding any case binding me to hold the contrary, adopt his conclusion.

We have here, also, the absence of the other ingredient necessary to set aside a contract on the ground of undue influence, namely, the knowledge of the defendant, or circumstances sufficient to give him notice of such undue influence. See Pollock, p. 637.

It is, moreover, at least doubtful whether the influence exerted in this case is what is in law called "undue influence." "Solicitation, importunity, argument, and persuasion, are not undue influence:" *Cyc.*, vol. 9, p. 455.

I am of opinion that the appeal should be allowed; but justice will be done by allowing the appeal without costs here or below. The appeal from the judgment after the jury trial will also be without costs—the settlement being affirmed, but the grounds urged for a new trial being overruled.

FALCONBRIDGE, C.J.:—I have delayed this for a time with a view of writing something. But I do not know that I can usefully add anything to what my learned brothers have said. I agree in the result arrived at by them.

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REX V. MECEKLETTE.

April 26.

*Criminal Law—Conviction of Foreigner—Habeas Corpus—Return of Valid Conviction and Warrant of Commitment—Right to Review Evidence—Prisoner not Understanding Proceedings at Trial—Interpreter—Capacity—Question for Magistrate—Rights of Foreigner on Trial.*

Upon a motion to discharge a prisoner, upon the return of a writ of *habeas corpus*, the proceedings should not be conducted as upon an appeal from the magistrate's finding; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he did. All questions as to admissibility of evidence, method of conducting examinations, etc., are in the power of the trial tribunal; and such questions cannot be raised upon a motion to discharge.

In this case the return was good upon its face, shewing a warrant of commitment which recited the conviction of the defendant for unlawfully committing an act of indecency in a public place; and there was ample evidence to support the conviction; but the defendant attempted to shew by affidavits that, not understanding English, he did not know that he was on trial, and did not understand the evidence given. This was contradicted by one who was sworn as an interpreter at the trial, and by a policeman:—

*Held*, that the capacity of the interpreter and all matters connected with the interpretation of the evidence were questions for the magistrate, and his finding could not be attacked in this way.

*Semble*, that there is no inherent right in any foreigner that the proceedings taken in the Courts of this Province shall be made wholly intelligible to him, even though he should be charged with crime. Cases in which a contrary doctrine is laid down turn upon some statutory or constitutional provision.

MOTION for an order for the discharge of the prisoner, upon the return to a writ of *habeas corpus* granted by TEETZEL, J. The facts are stated in the judgment.

The motion was heard by RIDDELL, J., in Chambers, on the 20th April, 1909.

*T. C. Robinette*, K.C., for the applicant.

*E. Bayly*, K.C., for the Crown.

April 26. RIDDELL, J.:—The return is admittedly good upon its face, shewing as it does a warrant of commitment which recites the conviction of the defendant for unlawfully committing an act of indecency in a public place.

But I am asked to act upon certain affidavits intended to shew that the defendant, not understanding English, did not know that he was on trial, and did not understand the evidence given. An interpreter was sworn to interpret, and he says that

he understands and speaks Italian, that he interpreted and explained the charge to the defendant, that the defendant pleaded "not guilty," and that he (the interpreter) has no doubt that the defendant thoroughly understood all about the trial and the evidence given. A policeman also swears that he, upon arresting the defendant, had a conversation with him for about ten minutes, that the defendant spoke fairly good English, and that he (the policeman) understood practically all the defendant said, and that the defendant answered intelligently questions put to him in English.

For the defendant it is set up that he comes from the north of Italy, and the interpreter is a Sicilian, who does not understand or speak Italian.

Upon a motion to discharge on the return of a writ of *habeas corpus*, care should be taken not to conduct the proceedings as though they were an appeal from the magistrate's findings; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he has done: *Rex v. Farrell* (1907), 15 O.L.R. 100.

I do not decide that even this can be done under a *habeas corpus* in a criminal case such as this is. But, if such an inquiry can be made, it can go no further. Here there is ample evidence to support the conviction.

All questions as to admissibility of evidence, method of conducting examinations, etc., are considered as in the power of the trial tribunal; and such questions cannot be raised upon applications of this character: *Rex v. Graf* (1909), 13 O.W.R. 943.

Were it open to me to consider all the allegations in the affidavits, I should unhesitatingly believe the interpreter's statements. I am convinced that the defendant had a fair trial. There is, moreover, much to be said in favour of the view that there is no inherent right in any foreigner that the proceedings taken in our Courts shall be made wholly intelligible to him, even though he should be charged with crime. It might be impossible, within a reasonable time, and at a reasonable expense, to procure a person who could explain the proceedings to a foreign defendant. The cases in which a contrary doctrine is laid down are all upon some statutory or constitutional provision. For

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example, in *Rex v. Ah Har* (1888), 7 Haw. 319, a case in Hawaii, it was held that the accused must in some way be made acquainted with the evidence of the witnesses, and that, if he have no counsel, the testimony, if in a language foreign to him, must be interpreted to him. But the Constitution of Hawaii provided, sec. 7, that an accused person should have the right to meet the witnesses produced against him face to face, and that he might, by himself or his counsel, at his election, examine the witnesses. The Court held that sec. 7 is not complied with unless the accused is in some way made to understand the evidence, in order to enable him to avail himself of his further expressed constitutional right of cross-examining the witnesses and of meeting their evidence by his own proofs.

So, after a change in the form of government, the same rule was approved in 1899 in the case of *The Republic of Hawaii v. Yamane*, 12 Haw. 189.

The case of *Commonwealth v. Lenousky* (1903), 206 Pa. St. 277, is not in point—the gist of that case being that certain evidence, which admittedly could not be received unless cross-examination had been had or waived, was not rendered admissible upon the ground of waiver by the fact that the prisoner had been present, had had an opportunity of cross-examining, and had not cross-examined. “This opportunity amounted to nothing. The prisoner was a foreigner, acquainted with the language of the witness but not with that in which the proceedings were conducted, and ignorant of their nature and of his rights under them. There could be no waiver without knowledge, and the circumstances all indicate that the prisoner did not know of his right:” p. 279. Whether this decision is unsound, as intimated in *Wigmore on Evidence*, sec. 1393, n. 3, it is unnecessary to inquire. The case is not helpful.

I am not prepared to assent to the doctrine of the Hawaii cases as applicable to our Courts; and I do not find any authority tending to that conclusion, and, in any case, the capacity of the interpreter is a question for the magistrate. All matters connected with the interpretation of evidence, etc., are for him, and his finding cannot be attacked in this way.

The present disposition of the matter will not, of course, interfere with any proceedings by way of appeal.

The motion will be refused.

E.B.B.

[FALCONBRIDGE, C.J.K.B.]

RE MUTUAL LIFE ASSOCIATION.

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WELLINGTON'S CLAIM.

May 1.

*Life Insurance—Winding-up of Company—Distribution of Deposits and Trust Assets—Dominion Winding-up Act—Dominion Insurance Act—Ontario Insurance Act—Rights of Policy-holders and Beneficiaries—Preferred Class—Payment into Court—Payment out on Death of Assured.*

Where an order had been made for the winding-up of a life insurance company under the Dominion Winding-up Act, and the deposits of the company held by the Minister of Finance and the assets held by trustees under the Dominion Insurance Act were in the hands of the liquidator and were being distributed by him, a question arose as to whether payment should be made, under policies issued by the company, to the assured or to the beneficiaries:—

*Held*, that the intention of the Insurance Act is to provide funds to meet the claims of persons who were resident in Canada at the time the contract with the company was made, and that, both under that Act and the Winding-up Act, the provisions for the distribution of the fund are directed entirely to questions arising as between the company and the assured and between the Canadian policy-holders themselves; there is no interference with rights which may have been acquired by third persons against policy-holders; and the liquidator is bound to take notice of assignments of the policies in respect of which he is making a distribution of the fund, and also of declarations in favour of preferred beneficiaries.

Under the Ontario Insurance Act, the assured may make changes in the members of the class of preferred beneficiaries who are to take; the right of any beneficiary is not absolute until he shall have survived the assured; and the mere accident that moneys become payable in respect of the policy in the lifetime of the assured, while it does not impair, does not accelerate, the rights of the beneficiaries.

In this case the moneys payable in respect of a policy were ordered to be paid into Court, there to be subject to control of the assured as of a trust fund created under sec. 159 of the Ontario Insurance Act; and, subject thereto, to be paid out, on the death of the assured, to the named beneficiaries then surviving.

AN appeal by the official guardian, representing Beatrice Wellington, an infant, from a certificate of Mr. J. A. McAndrew, official referee, dated the 31st March, 1909, of his finding, in the course of a reference for the winding-up of the association, that certain dividends were payable to W. E. Wellington, the assured under a certain policy issued by the association. The facts are stated in the judgment.

The appeal was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court, on the 15th April, 1909.

*M. C. Cameron*, for the official guardian.

*W. E. Middleton*, K.C., for the liquidator.

*E. B. Ryckman*, K.C., for W. E. Wellington.

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RE MUTUAL  
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May 1. FALCONBRIDGE, C.J.:—The winding-up order was made under the Dominion Act, R.S.C. 1906, ch. 144, on the 18th February, 1908. The deposits of the association held by the Minister of Finance and the assets held by trustees under the Insurance Act, R.S.C. 1906, ch. 34, are now in the hands of the liquidator and are being distributed by him, and an interim dividend of 40 per cent. upon the claims has been ordered. In the distribution of the fund a question has arisen as to the payment of dividends where the beneficiaries in policies upon which claims have been allowed are infants. An appointment was given by the referee for the consideration of this question, and the point was argued. The referee subsequently issued his certificate, dated the 31st March, 1909, by which he held that the dividends are payable to the assured, and not to the beneficiaries named in the policies.

The official guardian and the solicitor for the liquidator subsequently applied to the Chief Justice of the Common Pleas for directions as to what form the appeal from the above certificate should take, and they were directed to select one claim as a test case.

W. E. Wellington, whose claim is the largest, has, at their request, consented to his claim being put forward as the one to be appealed. The claim is made under policy No. 156676 of the association, for \$20,000, on the life of W. E. Wellington, and the beneficiaries named are "Earle, Stanley, Frederick William, Beatrice Maud, and Blanche Norine Wellington (children), share and share alike . . . if living at the time of the death of said member, otherwise to the executors or administrators of said member."

The referee by his certificate has held, as above stated, that the dividends payable in respect of this policy are payable to W. E. Wellington, and not to the beneficiaries. From this the official guardian, on behalf of the infant Beatrice Wellington, now appeals.

The referee has based his decision particularly on secs. 162 and 163 of the Winding-up Act. Those sections appear in Part III. of the statute, which part relates particularly to life insurance companies. The purpose of these sections generally is to provide for the application of deposits held by the Minister

and of the assets held by the trustees under the Insurance Act, and they provide, in effect, that the policy-holders in Canada are entitled to claim for the net values of their policies; that such claims rank with judgments against the company upon policies in Canada; and that the proceeds of the sale of the securities held by the Minister and the assets held by the trustees are to be divided *pro rata* in accordance with such claims and judgments.

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There are no definitions in the Winding-up Act which affect the present question; but the Insurance Act, R.S.C. 1906, ch. 34, by sec. 2, sub-sec. (h), defines "Canadian policy" or "policy in Canada," as regards life insurance, to mean a policy issued by any company licensed under that Act to transact the business of life insurance in Canada, in favour of any person or persons resident in Canada at the time when such policy was issued. By sub-sec. (u), "policy-holder in Canada" means, as respects life insurance, any person in favour of whom any company licensed under that Act to transact the business of life insurance in Canada has, while such person was resident in Canada, issued a policy. These definitions do not in words include assignees of the assured or the beneficiaries to whom the policies are made payable. The assignee is provided for in one case; he is included in the term "policy-holder," as defined by sub-sec. (v) of sec. 2, when used in reference to the person to whom a tender is made by the Minister, upon a company which voluntarily ceases to do business in Canada applying for a release of deposits.

If full effect is to be given to these definitions, it would seem that where a company ceases to do business, and applies for a release of its deposits, the assured or his assignee is entitled to say whether he will accept a transfer of his policy to another company or a surrender; whereas, if the company is being wound up compulsorily under the Winding-up Act, no provision is made for the protection of the assignee. I think that the intention of the Insurance Act is simply to provide funds to meet the claims of persons who were resident in Canada at the time the contract with the company was made, and that both under that Act and the Winding-up Act the provisions for the distribution of the fund are directed entirely to the questions arising as between the company and the assured and between the Canadian policy-



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holders themselves. I do not see that the statute was intended to interfere or does in any way interfere with rights which may have been acquired by third persons against the policy-holder. The fund for division represents, as nearly as possible, the moneys secured by the policy; and in the division of that fund the rights as between the policy-holders and their assignees or the beneficiaries to whom their policies have been made payable are not affected by the winding-up. It could hardly be argued that the effect of the Winding-up Act was to defeat the rights of an assignee. The position of preferred beneficiaries under the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 159, is the same for present purposes. These beneficiaries have an interest in the policy, even during the lifetime of the assured: *Doull v. Doelle* (1905), 10 O.L.R. 411. The moneys payable in respect of the policy are trust funds, as to which they are beneficiaries, and their nomination as beneficiaries is in effect an assignment of the policy to them, subject to the right of the assured to change the beneficiaries in the cases permitted by the Act, and to their surviving the assured.

The liquidator is, therefore, bound to take notice of assignments of the policies in respect of which he is making a distribution of the fund, and also of declarations in favour of preferred beneficiaries.

The principle of the Ontario Insurance Act is to permit the assured from time to time to make whatever changes he may consider necessary or advisable in the members of the preferred class of beneficiaries who are to take. And in any event the right of any such beneficiary to participate is not absolute until he shall have survived the assured. Therefore, in this case, the mere accident that moneys become payable in respect of the policy by reason of the winding-up of the association in the lifetime of the assured, while it does not impair, does not accelerate, the rights of the beneficiaries.

The moneys should be paid into Court to the credit of this matter, and while there will be subject to such control of the assured as is exercisable by him over a trust fund created by sec. 159 of the Ontario Insurance Act; and, subject as above, the moneys may be paid out, on the death of W. E. Wellington, to the named beneficiaries then surviving, in equal shares.

As this matter is brought up wholly as a test case in the winding-up of the association, and not as a contest between W. E. Wellington and his children, the costs of all parties will be paid by the liquidator out of the funds in his hands.

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[IN CHAMBERS.]

REX v. COOK.

1908

Oct. 21.

*Criminal Law—Magistrate's Conviction—Motion to Quash—New Procedure—8 Edw. VII. ch. 34—Certiorari—Right Taken away—Ontario Summary Convictions Act, sec. 7, sub-sec. 2—Right of Appeal—Liquor License Act, sec. 118—Adequate Remedy—Jurisdiction of Magistrate.*

The right to take the new procedure for the quashing of convictions, etc., substituted by 8 Edw. VII. ch. 34 (O.) for *certiorari* and proceedings founded thereon, must be confined to cases in which, prior to that Act, the defendant would have been entitled to a writ of *certiorari*; and where the right to *certiorari* is taken away the new procedure is not applicable.

A motion made under the new procedure to quash a magistrate's conviction for an offence against the Ontario Liquor License Act was dismissed, except as to one ground, it being considered that the other objections to the conviction were not such as, if substantiated, would oust the jurisdiction of the magistrate, and also that in respect of them the defendant would have an adequate remedy by the appeal given him by sec. 118 of the Liquor License Act; and, in these circumstances, the right to *certiorari*, and therefore the right to move under the new procedure, was taken away by sec. 7, sub-sec. 2, of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12, sec. 14, amended by 4 Edw. VII. ch. 10, sec. 23.

It cannot be said that, because defects in the proceedings before the magistrate may be cured by the appellate tribunal, therefore an appeal does not afford an adequate remedy.

THIS was a motion on behalf of the defendant to quash his conviction by the police magistrate for the town of Trenton, as for a second offence of unlawfully selling liquor during hours prohibited by the Liquor License Act. The facts are stated in the judgment.

The motion was heard by ANGLIN, J., in Chambers, on the 9th October, 1908.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown.

October 21. ANGLIN, J.:—Upon the matter being opened, Mr. Cartwright took the exception that the motion should not be entertained, on the ground that prior to the statute 8 Edw. VII.

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ch. 34 (O.)\* the defendant would not have been entitled to obtain a writ of *certiorari*, because sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act, as enacted by the statute 2 Edw. VII. ch. 12, sec. 14, amended by 4 Edw. VII. ch. 10, sec. 23, provides that "no such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of *certiorari* except upon the ground that an appeal, as by any special Act or as herein provided, would not afford an adequate remedy." I decided to take the course of disposing of this preliminary objection before hearing argument upon the motion to quash.

Mr. Cartwright's contention is that the procedure under the statute 8 Edw. VII. ch. 34 is substituted for the procedure by *certiorari*, and that where, by legislation prior to this statute, *certiorari* had been taken away, the right to resort to the substituted mode of procedure does not exist. He further contends that in the present case the appeal expressly given by sec. 118 of the Liquor License Act affords to the defendant an adequate remedy.

Mr. Mackenzie maintains that sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act does not affect the right of the defendant to proceed as provided by ch. 34 of the statutes of 8 Edw. VII., and that the appeal given by sec. 118 of the Liquor License Act does not afford to the defendant an adequate remedy in respect of his objections numbered 1, 2, 3, 4, 7, and 8, set out below. Mr. Mackenzie stated that the other five objections in his notice of motion need not be considered in disposing of Mr. Cartwright's objection.

The first question for determination is whether a defendant is entitled to bring his conviction by an inferior Court before the High Court by the procedure provided by the statute 8 Edw. VII., in cases in which he could not, before that procedure was authorised, have brought up the conviction by *certiorari*.

It is only necessary to peruse sec. 1 of the statute 8 Edw. VII. ch. 34 to realise that the procedure there provided is, as stated

\* This Act, by sec. 1, amends the Judicature Act by adding thereto a new section, 101 a, sub-sec. (1) of which is as follows: "In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by *certiorari*, or by rule or order *nisi*." The following sub-sections prescribe the procedure to be followed.

in the side-note to sub-sec. 1, "Procedure substituted for *certiorari*." The whole purpose of this legislation was to provide a less expensive and a more direct and simple method of bringing before the Court applications to quash convictions, orders, warrants, or inquisitions. For these purposes the former procedure was, in the first place, to bring up the proceedings in the inferior Court by writ of *certiorari*, and then, upon the material thus brought before the High Court, to move for a rule or order *nisi*, and upon the return of such rule or order to argue the motion for the quashing of the conviction, order, warrant, or inquisition. It was certainly not intended by the legislation of 8 Edw. VII. to enlarge the number of cases in which the High Court should entertain motions to quash convictions. Formerly these motions could only be launched where the defendant was entitled to bring up the proceedings by writ of *certiorari*. In lieu of the right to writ of *certiorari* and the subsequent proceedings to quash convictions above detailed, a defendant is now afforded the simple and more expeditious procedure of serving, in the first instance, a notice of motion to quash his conviction, returnable before a Judge in Chambers, and, by the statute, upon such notice of motion being served, the defendant becomes entitled to such relief as he would formerly have had when he had brought papers up by *certiorari* and had moved to quash.

It would, in my opinion, be entirely contrary to the intention of the Legislature to hold that the effect of substituting this new procedure for the former procedure by *certiorari* and rule or order *nisi*, etc., is to render the substituted procedure applicable to the many cases in which, by legislation, the right to *certiorari* had been taken away. Such an effect should not be given to the recent legislation. The right to take the new procedure which is substituted for *certiorari*, etc., must be confined to cases in which, prior to the legislation of 8 Edw. VII., the defendant would have been entitled to a writ of *certiorari*.

As pointed out by Mr. Mackenzie, it has been held that sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act does not take away the right to *certiorari* in respect of convictions made by magistrates without jurisdiction: *Rex v. St. Pierre* (1902), 4 O.L.R. 76. But, upon looking over the objections which Mr. Mackenzie says are material in disposing of Mr. Cartwright's

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objection, I do not find any of them to be such that, if substantiated, it would oust the jurisdiction of the magistrate. Neither do I find that, in respect of any of these objections, the defendant would not have an adequate remedy by the appeal given him by sec. 118 of the Liquor License Act. The objections of the defendant numbered 1, 2, 3, 4, 7, and 8 are as follows:—

“1. The prior conviction is insufficiently charged in the information.

“2. The admission, no less than the certificate, of said prior conviction goes beyond the charge.

“3. Both admission and certificate are in themselves insufficient.

“4. It was not open to the prosecutor to utilise both admission and certificate.

“7. Evidence pointing to a sale on the previous day, 15th August, was wrongly admitted.

“8. The conviction improperly directs the making of a distress for non-payment of the fine.”

Every one of these matters would be open for review upon an application by the defendant, and would be as effective before the county court Judge as it can be in this Court. (Compare 6 Edw. VII. ch. 47, sec. 30, with R.S.O. 1897, ch. 92, sec. 13.) It may be that the powers of the Judge hearing the appeal to take further evidence and to amend (R.S.O. 1897, ch. 92, sec. 7) would enable him to cure some defects which might be found in the proceedings before the magistrate, but I do not understand that, because such defects might be thus cured on appeal, it can be said that the appeal does not afford to the defendant an adequate remedy.

If no other objection were taken on behalf of the defendant than those set out above, the conclusion would seem to me inevitable that the effect of sub-sec. 2 of sec. 7 of the Summary Convictions Act would be to deprive him of the right to move under sec. 101 (a) of the Judicature Act (8 Edw. VII. ch. 34), just as it would have deprived him of the right to *certiorari* under the former practice.

But it seems to me that, amongst the objections taken which Mr. Mackenzie said he did not consider material for consideration in dealing with Mr. Cartwright's objection, there is one

which, if substantiated, would suffice to oust the jurisdiction of the magistrate. The 6th objection taken is: "There was no evidence of a sale on the licensed premises." It has been held that, in making a conviction without evidence of the offence charged, a magistrate acts without jurisdiction, and, *certiorari* not being taken away where the magistrate has convicted without jurisdiction, I think Mr. Mackenzie is entitled, perhaps as a matter of grace, in view of the position which he took upon the argument, to ask that his motion to quash shall be heard upon this 6th objection.

The remaining objections, numbers 5, 9, 10, and 11, are as follows:—

"5. It has not been made to appear that such certificate was drawn up or put in after judgment finding the defendant guilty of the subsequent offence.

"9. The conviction should have alleged that it was made after information laid and conviction had for a first offence.

"10. Evidence of the possession of liquor by the witness Frank Wilson was improperly received.

"11. The offence was not the same at the time of the making of the prior conviction or the commission of the offence charged thereby as it is now."

None of these objections, if substantiated, would suffice to oust the jurisdiction of the magistrate, and each of them might have been taken upon an appeal to the county court Judge, and would have been quite as effective before him as it can be in this Court upon the present motion.

In respect of these objections, therefore, the right of *certiorari* was, in my opinion, taken away by the statute of 2 Edw. VII., and, consequently, there is no present right to maintain the motion to quash the conviction upon any of these grounds under the procedure provided by the statute of 8 Edw. VII.

Under these circumstances, I will hear argument by counsel for the defendant in support of his motion to quash his client's conviction upon the 6th ground taken in his notice of motion. I will hear this argument in Chambers on Tuesday next, the 27th instant.\*

\* The motion was argued on that day and dismissed.

[IN CHAMBERS.]

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REX V. RENAUD.

April 30. *Intoxicating Liquors—Liquor License Act—Convictions for Second Offences—Alleged Convictions for First Offences on same Informations—Failure of Evidence to Establish—Unauthorised Distress—Excessive Imprisonment—Summary Convictions Act, sec. 7, sub-sec. 2—Certiorari Taken away—Jurisdiction of Justice of the Peace.*

Upon an application by the defendant to quash two convictions made by a justice of the peace for offences against the Liquor License Act, the defendant stated that, having been summoned to appear before the justice at one p.m. on a certain day to answer two charges of selling liquor during prohibited hours, the offences charged not being alleged to be second offences, he went to the justice in the forenoon of the day for which he was summoned, acknowledged his guilt, was found guilty and fined, and paid his fines, and subsequently on the same day, the informations having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offences:—

*Held*, that the principal objection, *viz.*, that the alleged first convictions were bad because the penalties imposed exceeded those authorised for first offences, and that the alleged second convictions were bad because of the existence of the alleged first convictions, failed on the evidence, there having been in fact no convictions at the earlier hour, and therefore no payment of fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the complaints should be formally heard.

The other objections related to the provision as to the recovery of penalties by distress, which was found in the convictions but not in the minute of adjudication, and the term of imprisonment imposed in default of payment of the fines and costs, the former being, it was urged, wholly unauthorised, and the latter in excess of what is authorised by the Act:—

*Held*, that, assuming both to be valid objections, not to be got rid of by amendment in the present proceedings, they did not entitle the applicant to invoke the aid of the Court to quash the convictions, because by the provisions of sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12; sec. 14 (amended by 4 Edw. VII. ch. 10, sec. 23), the right to *certiorari* is taken away, and therefore the right to apply under the new procedure to quash the convictions, except in cases where there is no adequate remedy by appeal; and the objections were not such as affected the jurisdiction of the justice in such a way as to make the provisions of the sub-section inapplicable.

*Rex v. Cook* (1908), *ante* 415, followed.

MOTION by Honore Renaud, the defendant, to quash two convictions dated the 28th September, 1908, made by Henry Smith, a justice of the peace for the united counties of Prescott and Russell, for offences against the Liquor License Act—selling during prohibited hours—the same being second offences. The motion was made under the new procedure provided by 8 Edw. VII. ch. 34 (O.) The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in Chambers, on the 8th December, 1908.

*J. A. Macintosh*, for the applicant.

*J. R. Cartwright*, K.C., for the Crown.

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April 30. MEREDITH, C.J.:—According to the contention of the applicant, having been summoned to appear before Mr. Smith on the 28th September, 1908, at one p.m., to answer these charges of selling liquor during prohibited hours, they not being alleged to be second offences, he went in the morning of that day to the justice, acknowledged his guilt, was found guilty and fined, and paid his fines, and subsequently on the same day, the informations having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offences.

The principal objection argued was, that the alleged convictions were bad because the penalties imposed exceeded those authorised for first offences—the imprisonment being for three months, while for a first offence the maximum term of imprisonment is one month—and that the alleged second convictions—those made at the later hour—were bad because of the existence of the alleged first convictions made earlier in the same day.

In my opinion, this objection fails. The affidavits in opposition to the motion shew that no convictions were made at the earlier hour, that the applicant appeared before the justice, acknowledged that he was guilty of the offences with which he was charged, and asked what the fines he would be required to pay would be, and was told by the justice what the fines and costs would amount to, and thereupon paid the amount to the justice.

There was no adjudication by the justice upon this occasion, and nothing occurred to dispense with the attendance of the applicant before him at the hour for which he was summoned to answer the charges which had been made against him.

At or shortly after the hour for which he had been summoned, the applicant attended before the justice, the Crown attorney being also present, and the informations, which, as I have said, had in the meantime been amended by charging the alleged infractions of the Act as second offences, were then read to the applicant, and he was informed of the two charges



Meredith, C.J. which had been laid against him, and to them he pleaded  
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He was then and there further charged that on the 14th August, 1907, he had been convicted before the police magistrate for the united counties of Prescott and Russell of having on the 7th day of that month sold liquor during prohibited hours, contrary to the Liquor License Act, and, on this further charge being stated to him, he pleaded "guilty" to it, and the justice thereupon adjudged that for each of the two offences of which he had pleaded guilty, the same being second offences, he should pay a fine of \$100 forthwith and costs amounting to \$4.40 in each case, and that in default he should be imprisoned in the common gaol at L'Orignal for three months.

The papers returned, in obedience to the notice to the justice, do not shew any proceedings had upon either of the informations except those resulting in the adjudication to which I have referred, and there does not appear to have been any minute of any proceeding before or of any adjudication by the justice at the earlier hour of the day.

The applicant controverts the correctness of the minute of the adjudication of the justice which is returned, but the affidavits filed in answer to the motion satisfy me that the minute is accurate.

The affidavits of the applicant are not, I think, candid. By paragraph 25 of his affidavit sworn on the 3rd November, 1908, an attempt is made to shew that the minute returned by the justice is inaccurate, but this is done by assuming, contrary to the fact, that it is a minute of what occurred in the morning; and by paragraph 26 of the same affidavit he states that the minute is not a correct minute of what took place in the afternoon, because, as the paragraph reads, "I was neither convicted nor did I pay any fine as noted in the said minute or record, as I had been convicted and had paid the said penalty and costs between nine and ten o'clock in the morning of the same day."

Exactly what is meant by the statements of paragraph 26 is difficult to understand. If they mean that he was not convicted of the two offences as second offences, as shewn by the

minute, it is sufficient to say that the affidavits to which I have referred satisfy me that the statements are contrary to the fact. If they mean merely that because of what took place in the morning he was not legally convicted, and that the payment of the fines and costs was under convictions made in the morning, the answer is, as I have said, that there was no conviction in the morning, and therefore no payment of the fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the summonses were returnable and the complaints were formally heard by the justice.

The other objections urged against the convictions relate to the provision as to the recovery of the penalties by distress, which is found in the convictions but not in the minute, and the term of imprisonment imposed in default of payment of the fines and costs, the former being, it is said, wholly unauthorised, and the latter in excess of what is authorised by the Act; but, in the view I take, it is unnecessary to say whether both or either of them are well founded, for, assuming both to be valid objections which cannot now be got rid of by amendment in the present proceedings, I am of opinion that the Court has no jurisdiction to quash the convictions.

*Rex v. Cook* (1908), *ante* 415, decides that such objections as these do not entitle the applicant to invoke the aid of this Court to quash the convictions notwithstanding the provisions of sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12, sec. 14, which provides that no conviction or order of, among other functionaries, a justice of the peace, made under the authority of provincial legislation, "shall be removed into the High Court of Justice by writ of *certiorari* except upon the ground that an appeal to the court of general sessions of the peace . . . would not afford an adequate remedy."\* That case decides that such objections do not affect the jurisdiction of the justice, in the sense in which his jurisdiction is affected according to decided cases so as to make the provisions of the sub-section inapplicable.

That decision is binding on me, and it was said upon the

\* This sub-section was amended (4 Edw. VII. ch. 10, sec. 23) by striking out the words "to the court of general sessions of the peace" and by inserting in lieu thereof the words "as by any special Act or."

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Meredith, C.J. argument that leave to appeal from it was refused, which gives  
1909 it greater weight. It is also, if I may say so, in accordance with  
my own view.

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It would have been a matter of regret if I had been compelled to reach a different conclusion, for, in my opinion, it would be difficult to parallel the effrontery of a person who, upon his own statement, goes before a justice by whom he had been summoned to appear, confesses to him his guilt of the charges laid against him, asks and learns what the penalty he will have to pay is, and pays it, and then when, according to his statement, the justice makes a formal conviction, and by it imposes imprisonment in excess of that authorised by law, comes to the Court and asks that the conviction be quashed on that ground and he be let go "scot free," receiving back the money he has paid and to be himself indemnified for the costs of the proceedings to quash the conviction—a conviction which could not by possibility have harmed him in the slightest, because the penalty had been paid, and it was only in case of default in paying it that the imprisonment was to be suffered.

The motion is dismissed with costs.

E.B.B.

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[RIDDELL, J.]

REX V. GUERIN.

1909

May 10.

*Criminal Law—Comment of Judge on Failure of Accused to Testify—Canada Evidence Act—R.S.C. 1906, ch. 145, sec. 4 (5).*

A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify, within the meaning of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4 (5).

THIS was a criminal prosecution of Aloysius Guerin on a charge of murder, and the trial took place on Wednesday, May 5th, 1909, at Stratford, before RIDDELL, J., and a jury.

At the close of the evidence, counsel for the prisoner asked for a case to be reserved upon the points mentioned in the judgment.

*E. E. A. DuVernet*, K.C., and *A. H. F. Lefroy*, K.C., for the Crown.

*J. W. Curry*, K.C., for the prisoner.

May 10. RIDDELL, J.:—Guerin was tried before me with a jury, at Stratford, upon a charge of manslaughter.

Mr. Curry, before the verdict, asked for a case to be reserved upon two points;—

1. There was not sufficient evidence to justify the submission of the case to the jury. I passed upon that at the end of the Crown's case, and have not changed my mind.

2. Counsel for the defence had, against the objections of the Crown, stated what his client said were the facts of the case. A witness had testified to an alleged conversation with the prisoner; the defence had tried to contradict this, but the witness upon whom the prisoner relied for such contradiction, it turned out, had not been present at that particular conversation. In charging the jury, I said that the evidence of the first witness was wholly uncontradicted, and spoke of the failure of the second witness to contradict.

Mr. Curry contends that this "is a pointing out to the jury indirectly that the prisoner has not gone into the witness box to contradict the evidence for the Crown, and that is a subject which cannot be commented upon because of the statute."



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I had no intention of referring even indirectly to the fact that the prisoner had not given evidence, the only matter in my mind being the hoped-for evidence, which failed; but, of course, the prisoner is entitled to take advantage even of an inadvertence.

The statute R.S.C. 1906, ch. 145, sec. 4 (5), says: "The failure of a person charged . . . to testify shall not be made the subject of comment by the Judge . . . ."

I cannot see how my speaking in the manner I did can be called a comment upon the failure of the prisoner to testify. In my own experience at the bar, I have heard the same kind of statement by trial Judges over and over again before 1892; and it never was thought an impropriety or an unfair thing to do at that time, when the mouth of the accused was closed. I do not see how it can now be a violation of the statute.

There was another point upon which a case was not asked, but upon which complaint was made. This arose out of a reason given by me to the jury for not allowing them to separate. For reasons given in the case of *Rex v. Labrie* (1909), 13 O.W.R. 1145, I do not enter into a discussion of the merits of the objection now. If, however, the Court of Appeal shall cause a case to be stated upon either of the two points first named, I may be spoken to with a view of stating this last point also.

A. H. F. L.

[NOTE.—See now 8-9 Edw. VII. c. 9, s. 2 (D.), amending R.S.C. 1906, c. 146, s. 1014 (3). This Act was assented to May 19, 1909.—W.R.R.]

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## [IN THE COURT OF APPEAL.]

REX V. O'GORMAN ET AL.

C. A.

1909

May 5.

*Criminal Law—Conspiracy—Offence Committed in One County and Tried in Another—Venue—Jurisdiction—Criminal Code, R.S.C. 1906, ch. 146, secs. 577, 653.*

On an information laid in the county of York, the accused were charged with numerous offences against the election law alleged to have been committed in the "county of York, and in the county of Middlesex, and at other places in the Province unknown." None of them resided, nor were found, nor apprehended in the county of York, but they were brought into that county solely by process issued under the information. Before the sitting of the assize court in the county of York the accused surrendered to the sheriff of the county, and elected to be tried before the county court Judge.

The grand jury returned a true bill against them. The offence, however, found to be established, and on which they were convicted, was a conspiracy wholly entered into and wholly carried out in the county of Middlesex, with no overt acts outside that county:—

*Held*, on a case reserved, that there was no jurisdiction to try the case in the county of York, and that the conviction should be quashed notwithstanding sec. 577 of the Criminal Code.

THIS was a case stated by John Winchester, Esquire, Judge of the county court of the county of York, sitting in the Judge's criminal court, upon the trial of the prisoners before him upon charges of conspiracy as set out in the judgments below; and was argued on February 2nd and 3rd, 1909, before Moss, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and TEETZEL, J.

*E. F. B. Johnston*, K.C., *J. M. McEvoy*, and *George Wilkie*, for the prisoners, contended that the county Judge had no jurisdiction, as no overt acts in Toronto had been proved; that the evidence shewed that there was no connection between what was done in London and what was done in Toronto six years before; that the conspiracies were not between the same parties, and that the Crown sought to prove an original conspiracy years ago, and then connect all the defendants with the original scheme; that at common law a conspiracy must be tried where it originated or where some overt act took place, and that as to the Criminal Code the defendants must be within the jurisdiction of the magistrate at the time he issues his warrant: R. S. C. 1906, ch. 146, secs. 577, 653, 654, 655, 665. As to corroboration, they cited Roscoe's Criminal Evidence, 12th ed., pp. 114-5; Russell on Crimes, 6th ed., vol. 3, pp. 646-7; *Rex v. Tate* [1908] 2 K.B. 680; and

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as to venue, Russell on Crimes, 6th ed., vol. 1, p. 527, and *Rex v. O'Gorman* (1907), 14 O.L.R. 102. They also referred to *Castro v. The Queen* (1874), L.R. 9 Q.B. 350, (1881), 6 App. Cas. 229; *Regina v. Deasy* (1883), 15 Cox C.C. 334; *Regina v. Bassett* (1843), 1 Cox C.C. 51; *Regina v. Boulton* (1871), 12 Cox C.C. 87; *Regina v. Barry* (1865), 4 F. & F. 389; *The King v. Bullock and Stevens* (1903), 8 Can. Crim. Cas. 8, at p. 11; *The King v. Wener* (1903), 6 Can. Crim. Cas. 406; *The King v. Smitheman* (1904), 9 Can. Crim. Cas. 10, 17; Tremear's Criminal Code, p. 668, note to sec. 834.

*G. Lynch-Staunton*, K.C., and *E. Bayly*, K.C., for the Crown, contended that the county court Judge had jurisdiction to try any charge of crime committed anywhere in the Province, his jurisdiction being provincial; and that the parties consented to be tried in Toronto, which gave jurisdiction, because it was a provincial case: *Regina v. Connolly* (1894), 25 O.R. 151, at p. 193; *Regina v. Burke* (1893), 24 O.R. 64. As to corroboration they referred to Roscoe's Criminal Evidence, 13th ed., p. 110. They also cited *The Queen v. Hogle* (1896), 5 Can. Crim. Cas. 53; Roscoe's Criminal Evidence, 13th ed., p. 359.

*Johnston*, in reply, referred to *Rex v. Warren* (1907), 71 J.P. 566, at p. 568; *Regina v. Harris* (1900), 64 J.P. 360.

May 5. GARROW, J.A.:—Case stated by John Winchester, Esquire, Judge of the county court of the county of York, sitting in the county Judge's criminal court, upon the trial of the prisoners before him upon charges of conspiracy, of which, subject to the case, they were found guilty.

The charge sheet or indictment contains 23 counts, all for offences, ranging over several years, against the election law, including bribery and other corrupt practices, interference with ballots and other election papers, opening a ballot-box, and other offences of a similar nature.

In many, but not in all of the counts, the offences are said to have been committed at the city of Toronto in the county of York, and at the city of London in the county of Middlesex, and at other places in the Province unknown.

None of the prisoners resided in the county of York, but were brought into that county solely by virtue of process issued under the information, which was laid before and the preliminary

examination held by the police magistrate at the city of Toronto.

The questions reserved are as follows:—

“(1) The accused not being found or apprehended in the county of York, but having been committed for trial by the police magistrate for the city of Toronto, and a true bill upon the indictment indicated above having been found against them by the grand jury at the assizes in Toronto, and having been admitted to bail to appear and stand their trial at the assizes, and the accused before the sittings of the assize court having surrendered to the sheriff of the county of York and elected trial before me; under these circumstances and the circumstances shewn in the evidence, had I jurisdiction to try the case?

“(2) Was it competent for the Crown to charge in the various counts in the indictment, or charge sheet, a conspiracy ‘at the city of Toronto, in the county of York, and at the city of London, in the county of Middlesex, and at other places,’ and was the Crown bound to elect to proceed upon some one conspiracy in each count, and is the indictment or charge sheet bad for that reason?

“(3) Is there evidence sufficient to support my finding of guilty as against the accused or any of them?

“(4) I, being of opinion that Pritchett is not reliable and ought to be corroborated in essential points, is there corroboration in the evidence as to the connection of O’Gorman with Pritchett in any conspiracy charged in the charge sheet?

“(5) The illegal acts which it is charged that the accused conspired to do being no longer punishable as such because barred by statute limiting the time for bringing prosecutions therefor, can a charge of conspiracy to do the act barred be maintained?

“(6) The defendants moved before Mr. Justice Britton for an order changing the venue in this case to London. The Crown then proposed to prove the accused guilty of a conspiracy in Toronto, and the Judge refused the order to change the venue, stating in his reported judgment: ‘Upon the assumption that the accused will not be convicted unless the Crown establishes that they did in fact commit one or more of these offences at Toronto as charged, what is there before me to shew that it is expedient to the ends of justice that the trial should not take place in Toronto?’

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"In view of the accused having delivered themselves to the sheriff of the county of York, and requiring a summary trial before me, had I, as county Judge of the county of York, exercising jurisdiction under the sections of the Criminal Code applicable in that behalf, jurisdiction to try the accused, or, owing to the fact that the Crown had failed to establish any offence against any of the accused except O'Gorman committed in Toronto, should I have discharged the accused other than O'Gorman?"

Two separate and distinct conspiracies were found by the learned Judge to be established—one between the prisoner O'Gorman and a man called Pritchett, to unlawfully spoil or otherwise interfere with ballots; the other between all the defendants, for bribery and other corrupt and illegal acts in connection with an election held in the city of London to the House of Commons, in June, 1905.

In the first-mentioned conspiracy there was evidence, if believed, of certain overt acts at the city of Toronto; but treating the second as a separate and distinct offence, as was held by the learned county Judge to be the case, the evidence would not warrant a similar conclusion as to it. It is indeed beyond question that the latter offence was wholly committed at the city of London, with no overt acts, so far as appears, outside of the county of which that city forms a part, which circumstance gives rise to the serious question of jurisdiction raised by Nos. 1 and 6 of the questions submitted.

By the common law the rule was well established that the trial of all criminal offences must take place in the county or district in which the crime was committed: see *Rex v. Harris* (1762), 3 Burr. 1330. But in the case of the crime of conspiracy the trial might be had either where the criminal agreement, the gist of the action, was made, or where any overt act occurred: see *Regina v. Connolly*, 25 O.R. 151, and the cases there cited.

And the rule of the common law was not, I think, intended to be abrogated by the provisions of the Criminal Code, R.S.C. 1906, ch. 146, except to the extent therein expressly mentioned. The theory still is that local offences shall be tried locally, and not alone out of consideration for the prisoner, but in order that each locality may in this way be made to bear its proper share of enforcing the criminal law against the local offender.

Nothing in the Code would allow a justice of the peace at Toronto

to receive an information and issue his warrant for a crime wholly committed in the county of Middlesex, if the party charged resided and actually was there at the time the information was laid.

The indictment must, except in the case of an indictment ordered by a Judge or by the authority of the Attorney-General—see secs. 870, 873—be preceded by a preliminary inquiry before a justice, which of course means a justice having territorial jurisdiction: see sec. 653\* *et seq.* And in this way, and subject of course to the exceptions, the common law rule as to locality is still effectually maintained.

The exception here relied on as conferring jurisdiction is that contained in sec. 577, which reads as follows: "Unless otherwise specially provided in this Act, every Court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such Court to try, wherever committed within the province, if the accused is found or apprehended or is in custody within the jurisdiction of such Court, if he has been committed for trial to such Court, or ordered to be tried before such Court, or before any other Court, the jurisdiction of which has by lawful authority been transferred to such first-mentioned Court under any Act for the time being in force."

This section first appeared in the Criminal Code of 1892 as sec. 640. Before that there were a number of special provisions upon the subject of the place of trial of various criminal offences: see the Act respecting Criminal Procedure, R.S.C. 1886, ch. 174, secs. 6 to 23. And by sec. 140 of that Act no indictment could be preferred without the consent of the Court or of the Attorney-General in the case of several offences, of which conspiracy was one, without a preliminary inquiry before a justice of the peace. The territorial jurisdiction of the justice as expressed in sec. 30 of that Act is substantially the same as that defined in sec. 554 of the Code of 1892, and in sec. 653\* of the present Code, R.S.C. 1906, ch. 146. And in both Acts, in the former by sec. 641 and in the latter by secs. 870-873, the power to prefer an indictment is limited in very much the same way, namely (subject to exceptions), by a preliminary examination before a justice in which either the person charged has been committed, or the prosecutor has been bound over to prosecute. And

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\* Set out *infra*, p. 436.

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sec. 140 of the Criminal Procedure Act finally disappears as no longer necessary, since by the new machinery practically all prosecutions were to be begun by the preliminary inquiry required by that section. And gone also are the special provisions as to the place of trial to which I have referred, contained in secs. 8 to 23 of that Act, as also no longer necessary because of the introduction of the section (577 of the present Code) which I have before set out—which confers jurisdiction where the prisoner is found, or apprehended, or is in custody, the latter being the words upon which the Crown relies, and upon which the judgment of the learned Judge upon this branch rests.

It must, I think, be assumed that a charge of conspiracy committed at the county of York and the county of Middlesex is not the same offence as a charge of the same offence of conspiracy committed at the county of Middlesex alone. In the former the prosecution could lawfully take place in either county, or where the prisoners were found or apprehended, but in the latter the justice at Toronto would only have jurisdiction to enter upon the inquiry if the prisoners were, or were suspected to be, or resided, or were suspected to reside, within the limits over which such justice had jurisdiction: see sec. 653 of the present Code. And no one pretends that these prisoners were, or were suspected to be, or resided, or were suspected to reside, within the county of York, until they were forced into that jurisdiction under process in this prosecution. They have never to this moment been charged either before a justice or elsewhere with the offence of which they have been found guilty, namely, a conspiracy wholly entered into and wholly carried on in the county of Middlesex. The objection could not, by reason of the form of the charge, be raised until the facts were disclosed on the trial. The allegation of the place at which the offence was committed was a material one, and necessary to be proved to confer the jurisdiction. The custody in which the prisoners were was solely a custody in respect of the charge as laid, conferring jurisdiction to try that charge, but not any other charge which the Crown might see fit to prefer. The construction of statutory provisions respecting criminal procedure and the liberty of the subject is strict: see the remarks of Cockburn, C.J., in *Martin v. Mackonochie* (1878), 3 Q.B.D. 730, at p. 775: "All proceedings *in poenam* are, it need scarcely be observed, *strictissimi juris*; nor

should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to ensure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed." Here the right of these prisoners was clearly to be tried in the county of Middlesex, where the offence with which they were charged was committed, and where they resided and were (except perhaps O'Gorman) when the prosecution began, and where the large majority of the witnesses also resided. That right was interfered with by the Crown by introducing into the charge, it may be assumed in good faith, the important element of a Toronto connection, which turned out to be foundationless in fact. And failing to prove that, the whole charge, in my opinion, failed. The prisoners were entitled to say: "We were never before a justice, or in custody, nor otherwise charged with the offences of which we have been found guilty, and we were never asked to elect, nor did we ever elect to be tried upon such a charge before you."

Under sec. 827 of the present Code, the Crown officers' duty in the county Judge's criminal court is to prefer the charge for which the prisoner was committed. By sec. 834 he may, with the consent of the Judge, prefer another charge than that for which the prisoner was committed, but by sub-sec. 2 this charge takes the place of the other, and similar proceedings as to election, etc., must take place. Section 835, it is true, allows the Judge some latitude, the latitude, namely, which a jury has, familiar instances of which are, to find the prisoner guilty of an attempt, upon a charge of an offence, or generally of a lesser offence which is included in a greater one charged.

But this could not apply to the offence of conspiracy, which is either conspiracy or nothing, or justify the finding of a conspiracy charged as committed in one county but proved to have been wholly committed in another.

The important matter of jurisdiction cannot be made to depend on the good or the bad faith of the Crown officer responsible for initiating the prosecution, in inserting a false instead of a true locality as the place where the offence was committed, where locality is material.

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The recently decided case of *In re Seeley* (1908), 41 S.C.R. 5, to which we were referred, has, having regard to its facts, no bearing upon the questions to be here determined. The motion there was for a writ of *habeas corpus* after the trial and conviction, and the sections of the Code in question were not the same as here, and the facts were wholly different.

For these reasons I think the first and sixth questions should be answered against the learned Judge's jurisdiction to try the alleged conspiracy in respect of the London election.

As to question 2. The indictment or charge sheet is not, I think, open to the objection suggested in this question, but it was quite competent for the learned Judge, if he apprehended unfairness to the prisoners from the very comprehensive and indefinite nature of the charges, to have directed an election to be made. Nothing, however, now seems to turn upon this question or its proper answer, so I do not pursue the subject further.

As to questions 3 and 4, these need only be regarded as they bear upon the alleged conspiracy between the prisoner O'Gorman and Pritchett.

The learned Judge, in his reasons for judgment, made part of the case, states that Pritchett is only to be believed when "fully" corroborated, which I take it must mean corroborated as to every important and certainly as to every vital circumstance to which he deposes.

Now one of two vital things was to be proved, the first the criminal agreement itself, or secondly overt acts from which this agreement might be reasonably inferred. And it seems to me to be clear that the only part of Pritchett's evidence in which he implicates O'Gorman, which is at all corroborated, is that part in which he states that he did certain unlawful things. That he was in certain electoral districts for the unlawful purposes charged is beyond question, but what is there except his own evidence to connect his acts with O'Gorman, any more than with Reid or Molloy or any of the other prisoners? Absolutely nothing that I have been able to find in a careful perusal of the evidence, and I therefore think this charge, which wholly failed as to the other prisoners, should also have failed as to O'Gorman. We were referred to the case of *Rex v. Gray* (1904), 68 J.P. 327, where a somewhat similar question was treated as largely one of fact. To

some extent, perhaps, it may be, but it is worthy of observation that even in that case the things which were held to be corroborated were those which did not depend alone upon the prosecutor's evidence. The question whether there is any evidence is always a question of law, and so, also, in my opinion, usually must be the question whether evidence requiring corroboration has been corroborated.

It is not necessary, I think, to answer question 5, in view of the other answers before stated.

Upon the whole case I think the conviction as to both offences should be quashed.

And I have reached this conclusion with the less compunction [notwithstanding the fact that most serious offences against the election laws of the country are disclosed in the evidence as having been committed by the prisoners or some of them, offences which I would greatly regret to even appear to condone] for two reasons, the first because it appears that the offences themselves which formed the subject of the conspiracies charged were actually completed, and the prosecution should under these circumstances have more properly been for the completed offences and not for the conspiracy, a course not to be encouraged: see *Regina v. Boulton*, 12 Cox C.C. 87, at p. 93; and second, because it is and always was apparent that the only natural and proper place of trial was at London and not at Toronto, and the attempt to force the trial at the latter city and the opposition to the very reasonable proposition to change the venue, which if granted would have obviated all difficulties, savours of unfairness and even of oppression.

MOSS, C.J.O., OSLER, J.A., and TEETZEL, J., concurred.

MACLAREN, J.A.:—I have read the foregoing judgment of my brother Garrow, in which I concur. I will only add a few words to what he has said about the case of *In re Seeley*, 41 S.C.R. 5, which was not referred to in the argument before us, the report of the case having been published only since that time; and also as to sec. 577, on which the Crown relied on the question of jurisdiction, on the ground that the accused were "in custody" in Toronto.

In that case, Seeley was convicted by the stipendiary magistrate for Halifax, N.S., on two charges: (1) of having committed burglary

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at Sydney, N.S.; and (2) of having committed burglary in Halifax. He was sent to the penitentiary and sought to obtain his liberty by an application for a writ of *habeas corpus*, on the ground that he could not be tried in Halifax for an offence committed at Sydney, in another county.

Although the fact is not stated in so many words in the report, the only inference that can be drawn is that he was found and arrested in Halifax. His objection was that the Halifax magistrate had no jurisdiction to try him for an offence committed in Sydney. The Supreme Court held that he was properly brought before the Halifax magistrate under sec. 554 of the Criminal Code of 1892 (now sec. 653), which reads as follows: "Every justice may issue a warrant or summons, as hereinafter mentioned, to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases: (a) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or is suspected to reside within such limits . . . ." It is pointed out that with respect to an offender found within the county charged with an offence committed beyond the county, but within the province, the jurisdiction of the magistrate is as complete as if the offence had been committed within his territory. Also that while the Imperial Act, from which ours was partly copied, made it imperative, in case the evidence was sufficient to commit for trial, to send the accused to be tried in the county where the offence was committed, the Canadian Act was permissive, and by sec. 640 (now sec. 577) the Court of the place where the accused was found or apprehended was also competent to try him.

In this case the accused were not found or apprehended and were not in custody within the jurisdiction of the county Judge's criminal court of the county of York at the time the information was laid against them, so that the magistrate had no jurisdiction to commit them for trial in the county of York for an offence no part of which was committed within that county, and the county Judge's criminal court had no jurisdiction to try them and could not find them guilty of such an offence.

The prosecution could not, by simply alleging that the offence

was committed in the county of York, and either producing no evidence thereof or failing to prove the same, thereby secure the conviction of the accused in the county of York for an offence no part of which was committed within that county.

There is nothing in the report of the *Seeley* case to authorize or justify such a proceeding, nor can I find anything in the Criminal Code to take this case out of the common law rule on this point.

The next question is: Had the county Judge jurisdiction on account of the accused having been surrendered by their bail to the sheriff of York and having consented to be tried by him when brought before him by the sheriff under sec. 826 of the Criminal Code?

First, as to the consent. It appears from sec. 827 that if the accused consents to be tried by the Judge without a jury, the charge is prepared and he is arraigned upon it and is asked to plead. If he pleads "not guilty," as was done in this case, the question of jurisdiction may be raised under this general issue: Roscoe, 13th ed., p. 164.

Section 577, on which the Crown relies, reads as follows: "Unless otherwise specially provided in this Act, every court of criminal jurisdiction in any Province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the Province, if the accused is found or apprehended or is in custody within the jurisdiction of such Court, or ordered to be tried before any such Court," etc.

The stated case declares that these accused were not found or apprehended within the jurisdiction of the county Judge's criminal court for the county of York, but were in custody there from having been committed for trial by the police magistrate of Toronto on a charge of having committed an offence within the county of York, and from having been surrendered by their bail to the sheriff.

It has been decided by the Court of Appeal for Quebec that under this sec. 577 (then sec. 640 of the Criminal Code of 1892) the Court would only have jurisdiction to try the accused "if the committal was legal:" *The Queen v. Hogle*, 5 Can. Crim. Cas. 53.

The Judge having found that "the Crown had failed to establish any offence against any of the accused except O'Gorman, committed in Toronto," the foundation for the jurisdiction of the

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magistrate in the premises was wholly destroyed, and his committal of the accused and their custody were illegal.

When it appeared that there was no evidence of any part of the offences alleged having been committed within the county of York, and the magistrate not having jurisdiction on any other ground, but there being evidence of an offence committed beyond his jurisdiction, the proper course would have been for him to have acted upon sec. 665 (2), and to have ordered the accused "to be taken by a constable before some justice having jurisdiction in the place where the offence was committed." \*

There is no suggestion that the venue was laid at Toronto in this case otherwise than in good faith; but if the language of the Code were susceptible of the interpretation now sought to be put upon it, and that simply laying the venue at any particular place in the Province, without any evidence to support it, would give the magistrate and the Court jurisdiction, the criminal law might become an engine of oppression and injustice. In my opinion, the language of the Code is not susceptible of such an interpretation, and the procedure prescribed by Parliament cannot be used for such a purpose.

The first question and the first part of the sixth question should therefore be answered in the negative, and the second part of the sixth question in the affirmative.

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\* Criminal Code, R.S.C. 1906, ch. 146, sec. 665. The preliminary inquiry may be held either by one justice or by more justices than one.

2. If the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed.

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## [DIVISIONAL COURT.]

WESNER DRILLING CO. v. TREMBLAY.

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*Mechanics' Liens—Action to Enforce—Judgment—Sale of Land—Arrears of Taxes—Vendor and Purchaser—Rescission of Sale—Plaintiffs' Right to Costs of Resisting Appeal—Costs of Sale Proceedings—Costs of Lien-holders—Priority—Master's Report—Appeal.*

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The right, title, and interest of certain parties under a lease of lands was offered for sale by the Court, pursuant to a judgment in a mechanics' lien action. The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, though this was not known either to the vendors or purchaser:—

*Held*, that the purchaser took subject to the tax, and the utmost relief to which he was entitled was to have the contract wholly rescinded.

Where, in a mechanics' lien action, the defendants unsuccessfully appealed to a Divisional Court from the judgment at the trial, upholding the liens:—

*Held, per* ANGLIN, J., that the Master (upon a reference for sale of the lands. with a direction that the proceeds of the sale should be applied in payment of the liens and incumbrances, as the Master should direct, with subsequent interest and costs to be computed and taxed by him) should have added to the amount allowed the plaintiffs the costs of the appeal successfully opposed by them; also that, the judgment in the action having directed the Master to compute and tax subsequent interest and subsequent costs, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings, the same not exceeding 25 per cent. of the judgment recovered (R.S.O. 1897, ch. 153, sec. 41), and not merely the disbursements; that the Master properly directed that the costs not only of the plaintiffs, but also of the other lien-holders, should be paid in priority to the judgment debts of both for principal and interest; and that an appeal lies from the Master's report in a mechanics' lien action.

THIS was an appeal by the plaintiffs from the following judgment of ANGLIN, J., in the Weekly Court, setting out the circumstances of the case.

The motion before ANGLIN, J., which was by way of appeal from the report of the local Master at Chatham, was argued on February 15th, 1909.

*J. M. Ferguson*, for the plaintiffs.

*J. M. Pike*, K.C., for the defendants *J. A. Tremblay* and *B. Ballard*, and for the claimants *MacEwen Brothers*.

*W. E. Middleton*, K.C., for the purchaser.

February 17. ANGLIN, J.:—The plaintiffs appeal from the report of the Master at Chatham, made pursuant to a judgment of the Judge of the county court of the county of Kent, in a mechanics' lien action. The learned Judge who tried the action

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found the amounts of the liens and incumbrances to which the several parties are entitled. He directed payment of the amounts due to the lien-holders, with interest and costs aggregating \$5,864.16, and in default ordered a sale of the lands, with the approbation of the Master at Chatham, and directed that the proceeds of the sale should be applied in payment of the liens and incumbrances so found, "as the said Master shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said Master." From this judgment the defendants appealed unsuccessfully to a Divisional Court, the appeal being dismissed with costs.

The Master took the view that the plaintiffs are not entitled to any charge upon the property for the costs of this appeal, and he also held that he could only allow to them, in connection with the sale proceedings which were taken before him, their actual disbursements: sec. 35, sub-sec. 6, R.S.O. 1897, ch. 153. He also directed that the costs not only of the plaintiffs, but also of the other lien-holders, MacEwen Brothers, should be paid in priority to the judgment debts of both for principal and interest; and that, out of the purchase moneys, the sum of \$144.46 should be paid to the Ontario government on account of taxes under the Supplementary Revenue Act. The moneys realized from the sale fell short of being sufficient to satisfy the claims of the two lien-holders.

The plaintiffs appeal from the Master's report in respect of all these matters, claiming (1) that they should have been allowed to add to the costs upon the judgment their costs of opposing the defendants' appeal to the Divisional Court; (2) that the Master should have allowed them not merely their disbursements, but also their solicitors' costs upon the sale proceedings before him; (3) that MacEwen Brothers should not have been given priority for their costs over the plaintiffs' debt, but should merely have been allowed to add their costs to the amount of their claim and to receive a dividend upon their claim and costs together; and (4) that the purchaser should be required to take the property subject to the Ontario government tax, and that this should not be paid out of the purchase money.

Mr. Middleton questioned the right of appeal from the Master's report in a mechanics' lien action. But by sec. 31 of the Act,

as pointed out by Mr. Ferguson, the ordinary procedure of the High Court applies to this action "excepting where the same is covered by the Act." There is nothing in the statute which deprives a party to a mechanics' lien proceeding of the right of appeal from a Master's report in such an action which parties to all other actions in the High Court possess. I therefore think this right exists.

It is admitted that with the addition of costs of the appeal and solicitors' costs of the sale proceedings, the total amount of costs of the plaintiffs and other successful lien-holders would not exceed 25 per cent of the judgment recovered: sec. 41. In my opinion, the Master should have added to the amount allowed to the plaintiffs for costs the costs of the appeal to the Divisional Court, which they successfully opposed. They incurred these costs in supporting the judgment upholding the liens, and, having been given such costs, they are entitled, as to them, to be placed in the same position as with respect to the costs incurred in obtaining the original judgment itself.

As to the costs incurred upon the sale proceedings, these were, in my opinion, awarded to the plaintiffs by the paragraph of the judgment which directed the Master to compute and tax subsequent interest and subsequent costs. The Master himself, being the "officer with whose approbation the lands are sold," is, by sub-sec. 6 of sec. 35, authorized, without the authority of a judgment, only to allow to the person conducting the sale (in this case the plaintiff) his actual disbursements incurred in connection therewith. But the Judge or officer trying the lien action has the same powers as to giving and refusing costs as a Judge of the High Court, subject to the limitation that the total amount awarded to the plaintiffs and successful lien-holders shall not exceed 25 per cent of the amount of the judgment, besides actual disbursements. I think, therefore, that, under the judgment, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings. The appeal upon these two items will, accordingly, be allowed.

As to the right of MacEwen Brothers to be paid their costs in priority to the amount of the plaintiffs' lien, other than for costs, the statute provides that the costs allowed "shall be apportioned and borne in such proportion as the Judge or other officer who

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tries the action may direct:" sec. 41. The Judge has directed that the moneys realized shall be applied towards payment of the several claims set out in the first and third schedules to his judgment "as the said Master shall direct." I would have no doubt of the power of the Judge or officer trying the action to direct that the costs of all the successful lien-holders should be paid in priority to the judgment debt other than for costs of any of them. There may be some question as to his power to delegate this power to the Master. This question, however, was not raised by the appellants. The fifth clause of Form 13 to the Act, read in conjunction with sub-sec. 6 of sec. 35, appears to contemplate that the Master shall deal with this matter as he has been directed to do and as he has done in this action. The disposition and apportionment of the costs made by the Master is, in my opinion, authorized by sec. 35, sub-sec. 6, and the judgment entered in this action. I therefore think the plaintiffs' appeal from the Master's report upon this point cannot succeed.

As to the payment of \$144.46 to the Ontario government for taxes out of the proceeds of the sale, the position appears to be that the Master conducted the sale under the impression that there was no such charge or incumbrance upon the land, and the purchaser bought in the like belief. The existence of this claim for taxes was discovered later. The statute certainly appears to contemplate that only the estate or interest of the owner shall be the subject of the lien. The priority of the government tax over any lien cannot be questioned. The proper course would therefore appear to have been to sell, subject to this tax, and it may be that, as a matter of strict law, the purchaser would acquire only the estate or interest of the owner, being that which is covered by the lien, and would therefore take subject to the payment of the tax. But I am satisfied that the Court would not allow a purchaser from it to be put in any unfair position. Had the existence of the tax been known to the officer conducting the sale, it would, no doubt, have been communicated to the purchaser, and there could be little question that the purchase price would have been abated to the extent of the tax. The only effect which could be given to the objection taken on behalf of the plaintiffs would be to set aside the sale and to direct that the property should be again offered for sale. This would in-

volve a great deal of expense and inconvenience—probably a loss to the lien-holders greater than the amount of the tax—and I think the proper course is to affirm what the Master has done in directing that the government tax shall be paid out of the proceeds of the sale before satisfying the liens of the plaintiffs and MacEwen Brothers. The Court is, in my opinion, bound to protect its purchaser to this extent. The appeal upon this point should therefore be dismissed.

The plaintiffs should have one-half of their costs of this appeal paid to them by the defendants and the claimant Crawford, and the amount so to be paid may be added to the costs allowed by the Master's report. The plaintiffs should pay to the claimants MacEwen Brothers their costs of the appeal.

The appeal by the plaintiffs from the above judgment was argued on March 18th, 1909, before a Divisional Court composed of MEREDITH, C.J.C.P., and MAGEE and LATCHFORD, JJ.

*J. M. Ferguson*, for the appellants, contended that, as between vendor and purchaser, the purchaser should take subject to the government tax; that the purchasers here knew all about the government tax, and it was no injustice to them to make them become subject to it.

*W. E. Middleton*, K.C., for the purchaser, contended that all parties were ignorant of the existence of the tax, and that if the sale were re-opened, it would cause expense and hardship on parties not before the Court, and referred to *Turrill v. Turrill* (1877), 7 P.R. 142.

April 23. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the plaintiffs from an order of Anglin, J., dated February 17th, 1909, dismissing their appeal from a report of the local Master at Chatham, dated February 1st, 1909.

The action is a mechanics' lien action, and by the judgment pronounced at the trial, which is dated June 20th, 1908, it was ordered and adjudged that, in default of payment by the defendants into Court of the amounts which upon the reference directed by the judgment should be found due to the lien-holders, the lands upon which the lien existed should be sold with the

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approbation of the local Master at Chatham, and the purchase money paid into Court.

Default was made in payment of the amounts found due to the lien-holders, and a sale thereupon took place under the authority of the judgment.

The sale took place on December 19th, 1908, and what was advertised to be sold and was offered for sale was "all the right, title, and interest of J. Tremblay and B. Ballard under and by virtue of an oil and gas lease" in the west half of lot No. 12 north of the middle road in the township of Tilbury East.

The respondent became the purchaser at the sale, for the price of \$3,080, and signed an agreement to purchase the property mentioned in the advertisement or particulars, a copy of which is annexed to the agreement, at that price and upon the terms set forth in the conditions of sale.

The lands were at the time of the sale subject to a tax imposed by the Supplementary Revenue Act, 1907, amounting to \$144.46, but this was not known to the vendors or to the respondent.

By the report of the local Master at Chatham of February 1st, 1909, he deducted from the purchase money the amount of this tax and treated the sum realized from the sale as \$3,080, less the amount of the tax.

The plaintiffs appealed from this report as to various matters, including the deduction of the tax from the purchase money, and the appeal was heard by Anglin, J., who was of opinion that the proper course would have been to have sold subject to the tax, and that it might be that "as a matter of strict law the purchaser would only acquire the estate or interest of the owner, and would, therefore, take subject to the payment of the tax," but, being satisfied that "the Court would not allow a purchaser from it to be put in any unfair position," and of opinion that the only effect which could be given to the appellants' objection would be to set aside the sale, and to direct that the property be again offered for sale, and that "this would involve a great deal of expense and inconvenience—probably a loss to the lien-holders greater than the amount of the tax"—my learned brother thought that the proper course was to affirm what the Master had done, and he therefore dismissed the appeal.

We are, with great respect, of opinion that, however reasonable the course taken by the Master and approved by my learned brother may appear to have been in the circumstances, it was not proper or in accordance with the practice of the Court, against the will of the appellants, to vary the terms of the sale, as has practically been done by allowing the purchaser to deduct the amount of the tax from the purchase money.

All that was liable to the lien and all that was advertised for sale and purchased by the respondent was the estate, right, title, and interest of Tremblay and Ballard under the lease in the lands, and all that the purchaser was therefore entitled to was that estate, right, title, and interest; and he took, therefore, subject to the tax.

Where a sale takes place in Court, the Court, as my brother Anglin said, "will not allow a purchaser from it to be put in any unfair position."

No doubt, in the case of a sale in Court, where a purchaser is entitled to have a good title to the land itself shewn, and that free from incumbrances, his completion of the purchase in ignorance of an incumbrance which he would have been entitled to have paid out of the purchase money would not disentitle him, on discovery of the mistake, to have it rectified.

*Turrill v. Turrill*, 7 P.R. 142, was a case of that kind, and in that case Vice-Chancellor Blake rested his judgment upon the ground that as the Court, in the terms of sale, represented the premises as being sold and not a mere interest in them, the Court, as it had the means of doing so, by the money being in Court, should see that such a title as that which was represented by the advertisement should be given to the purchaser.

That is a very different thing from giving such relief to a purchaser who is not entitled to have an incumbrance paid out of his purchase money, but, under the terms of his contract, takes what is sold with the burden of the incumbrance upon it, which is doing what practically amounts to making a new and better bargain for him.

The utmost relief to which, in our opinion, the respondent was entitled was to have his contract wholly rescinded: Daniell's Chancery Practice, 7th ed., pp. 887-8.

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Mr. Middleton, for the respondent, intimated that if we should be of opinion that that was the full extent of the relief to which the respondent was entitled, he would elect to rescind his contract, and to his doing so no serious objection was urged by the appellants' counsel.

The order appealed from must, therefore, be discharged, and there be substituted for it an order rescinding the contract of sale and for payment out of Court to the respondent of the purchase money or so much of it as has been paid into Court, and directing a resale. So much also of the Master's report as relates to the sale must also be vacated.

We have had difficulty in determining how the costs of the appeals and of the sale which has proved abortive should be dealt with. There is much to be said for requiring the respondent to pay them, as the price of the indulgence which has been granted to him, but, upon the whole, we have reached the conclusion that there should be no costs of the appeals to either party, but that the respondent should be required to pay the costs of and incidental to the abortive sale.

A. H. F. L.

## [DIVISIONAL COURT.]

RE BREEN, A LUNATIC.

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*Lunatic—Committee of Estate—Moneys Advanced on Mortgage of Lunatic's Lands—Accounting—Expenditures not Sanctioned by Court—Improvements—Allowance for—Failure to Pass Accounts Yearly—Costs of Accounting—Remuneration of Committee.*

By an order made in 1892 the wife of the plaintiff was declared a lunatic, and a reference was directed to appoint a committee, who was to give security and pass accounts at least once a year. The defendants' predecessors were (on consent) appointed committee without security, and a report was made in 1893, which shewed the lunatic's estate to consist of a life interest in money in Court and incumbered land, with houses built thereon. The report also shewed that the committee had agreed to advance moneys to pay off the mortgages and for purposes of maintenance, which they did, taking an assignment of the mortgages. The lunatic died in 1899; and the plaintiff in 1906 began an action for redemption against the defendants, as successors of the original committee and assignees of the mortgagees. At the same time an appointment was issued in the lunacy matter for the defendants to bring in and pass their accounts before the referee; and the action was referred to him for trial. The committee had not passed their accounts previously. In 1898 the then committee had, without any authority from the Court, expended money in building a stable on the lunatic's land and in other ways. The committee looked upon the estate as hopelessly insolvent, and regarded themselves as mortgagees in possession. On the passing of the accounts the referee disallowed all payments made by the committee other than for taxes, insurance premiums, interest on mortgages, and minor repairs, and also refused to allow them remuneration for their services, and refused them their costs of accounting, and so reported:—

*Held*, by MEREDITH, C.J.C.P., on appeal, directing a reference back, that the defendants should be allowed for the expenditure upon the stable, if, upon the facts as found, a case should be made which would have been sufficient to have obtained an order permitting the expenditure to be made, had an application been made to the Court for authority to incur it; that the fact that the committee did not pass their accounts annually was not alone sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have been otherwise entitled to have allowed to them; and that the order on appeal should not prejudice the right of the defendants to claim that they were not to be chargeable as committee, but as mortgagees in possession.

This order was affirmed by a Divisional Court.

*Semble*, per BOYD, C., that, had there been no question to go back to the referee as to allowance for improvements, his ruling as to the costs of accounting should not have been disturbed; the onus was still on the committee to satisfy the referee that costs should be given and other allowances made, and how far given and made, notwithstanding the disregard of the order directing an annual passing of accounts.

APPEALS by the defendants from two reports of Mr. J. S. Cartwright, K.C., an official referee; and cross-appeals by the plaintiff from the reports.

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The reports were made respectively upon a reference in the matter of Emily Breen, a lunatic (deceased before the date of the reports), and in an action for redemption brought by Frank Breen, the husband of Emily Breen, against the Toronto General Trusts Corporation, as mortgagees of lands of the deceased.

The facts are set out in the reasons of the Referee for the making of the reports, as follows:—

December 8, 1908. THE REFEREE:—By order of the 16th October, 1892, Emily Breen, wife of the plaintiff, Frank Breen, was declared a lunatic, and the usual order was made by the Chancellor, requiring the committee to be appointed to give security and pass accounts at least once a year.

On the 16th January, 1893, a report was made by which it was shewn that, on consent of all parties, the Trusts Corporation of Ontario were appointed committee without security. The report shewed the personal property of the lunatic to be a life interest in \$2,000 in Court in the action of *Adams v. Patterson*, and that the real estate consisted of houses 82 (with stables in rear), 84, and 86, all on the west side of George street, in the city of Toronto, subject to three mortgages aggregating \$5,500 to the Farmers Loan Company, which, with interest and arrears and taxes, made up a sum of \$6,131.20. The net income of the real estate was estimated in the report at \$850, which, added to the interest on this \$2,000, made \$930 net income.

The report further stated that the corporation had agreed to advance enough to pay off the Farmers Loan Company, who were pressing for payment, and to provide for the immediate maintenance of the lunatic—all such moneys to bear interest at 6 per cent.

The report also recommended that Mrs. Breen should continue to be an inmate of the Provincial Lunatic Asylum, at a charge of \$4 per week.

This report was confirmed in February, 1893. Mrs. Breen died on the 11th October, 1899. The action for redemption was commenced on the 28th March, 1906. About the same time the plaintiff's solicitor took out an appointment requiring the defendants, as successors of the Trusts Corporation of Ontario, to bring in and pass their accounts before me. The action to redeem was also referred to me, and the two matters have proceeded together.

The accounts brought in shewed a balance in favour of the defendants.

This has been attacked by the plaintiff, and a great deal of evidence has been taken, extending to 225 pages. The accounts have been carefully scrutinised by the plaintiff's solicitors, and the matters were afterwards fully argued before me.

The position of a committee is fully considered in the case cited by Mr. Montgomery, *In re Fitzgerald* (1805), 2 Sch. & Lef. 432, which refers to *Beverley's Case* (1603), 4 Co. 126, 127. Mr. Montgomery also cited *In re Seager Hunt*, [1906] 2 Ch. 295, and *In re Walker*, [1907] 2 Ch. 120, which shew that the office of committee is terminated by the death of the lunatic, and the accounts of the committee as such can only be taken to that date. Afterwards the committee are answerable to the heirs or representatives of the deceased for any further dealings with the lunatic's estate.

The committee entered upon their duties, and advanced the money to pay off the Farmers Loan Company, etc., and took assignments of their securities.

In September, 1897, an order was made, on the committee's application, directing payment out to them of the money in Court, on their undertaking to reduce the interest to 5 per cent. upon the indebtedness of Mrs. Breen, and to apply the moneys as directed by said order. This was to be "upon F. Breen, the husband of the lunatic, and the official guardian consenting hereto." No consent of the former is shewn, if that is material to be found; nor any formal consent of the official guardian, though it may be implied. Under this order \$1,883 was received by the committee.

In the autumn of 1898 the then committee, without any authority or order from the Court, built a new stable on the property, at a cost of \$1,646. This item now appears in the accounts and is objected to.

On the 1st April, 1899, the Trusts Corporation of Ontario were, by 62 Vict. (2) ch. 109, amalgamated with the Toronto General Trusts Corporation. Those officers of the Trusts Corporation of Ontario who previously had charge of this matter for that corporation are no longer in the service of the corporation who are the present defendants, so that no explanation is available on many points where it might possibly have assisted the defendants or the plaintiff.

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The above mentioned expenditure on the new stables is strongly objected to by the plaintiff, as well as, (1) the employment of an agent to collect the rents, (2) the loss of rents, (3) the reduction of rents, and (4) the charges for commission, as being all made without authority, which should have been obtained for all these things, in order to relieve the committee from any resulting liability, and which would have, no doubt, been granted on a proper case being made therefor. This is pointed out in *In re Shaw* (1869), 15 Gr. 619, at p. 623, and had been already decided in *In re Brown* (1849), 1 Macn. & G. 201, at p. 205. There the fact that the Master—though wrongly—had sanctioned every step, was admitted as an excuse, but such could not arise in the present case.

There does not seem at present any power given to me to pass upon these unauthorised actions, nor could it be determined, at such a distance from the facts, if such expenditures were for the benefit of the lunatic, which is the primary consideration in these cases.

It was argued that the Trustee Relief Act should be applied in ease of the defendants. This, however, cannot be done. The committee are not trustees in that sense. This, I think, is clearly shewn in *Perrins v. Bellamy*, [1899] 1 Ch. 797, cited by the defendants' counsel. There Rigby, L.J., points out that a trustee cannot get the direction of the Court, except at his own cost, if at all. He must act on his own responsibility. But the duty of a committee is to act in the directly opposite way. He should do nothing without the sanction of the Court. See cases *supra*.

The whole difficulty has confessedly arisen here from the omission to comply with the order of October, 1892, as to passing the accounts. Had this been done, everything would have been settled at least once a year. The failure to collect the rents would have been excused, if justified; so, too, the reduction of rents, if reasonable, would have been allowed, and the employment of an agent to collect rents; perhaps even the expenditure on the stable would have been allowed—though that is more doubtful.

It is quite true that minor repairs can be made by a committee, but that is only in cases where the order is obeyed, and where, on the passing of the accounts annually, their necessity and reasonableness can be dealt with intelligently.

By the omission to pass the accounts annually, it seems to follow from *In re Walker* and *In re Seager Hunt* that I have now no power

to allow compensation—whether the Court can do so, I am not prepared or required to say.

The real explanation of all this independent course of dealing is that the estate was looked on by the committee as hopelessly insolvent. The first committee, as well as their successors, seem to have assumed that they were owners, and made leases and agreements for sale in their own name simply, and without any reference to the Court or to their character as committee. Indeed, Mr. Argles, an officer of the present defendant corporation, says they thought they were administrators of Mrs. Breen.

Some suggestion was made that the plaintiff had received a statement of account from Mr. Plummer, the manager of the Trusts Corporation of Ontario, and with which he was or must be assumed to have been satisfied, and that he could not now object to it. I think, however, that this is not so. He knew that the estate was incumbered, and doubtless he assumed (as he was entitled to do) that after his wife's death the committee would be in a position rapidly to extinguish the debt and discharge the incumbrance and hand back the estate to those entitled.

In November, 1899, the plaintiff made application through his then solicitors for a statement. If he ever got one, it was only after a long delay. It was not shewn what that statement set out, and it does not seem likely that it was very enlightening; for in 1902 the present defendants wrote, in answer to a request by the inspector for payment of arrears due for Mrs. Breen's maintenance, that they could not easily make out the state of the accounts, "which were complicated, as the former committee had not kept them in a good condition."

In existing circumstances, it is plainly impossible to have them properly made out.

After careful consideration, it appears to me that the payments to be allowed to the committee must be confined to taxes, premiums of insurance, the amounts properly chargeable for interest on the mortgages, and such items of repairs as do not exceed \$10 in any one case.

It was also sought to surcharge the account with arrears of rent and water rates not collected, and also with sums lost by failure of the corporations to charge adequate rentals.

These are, in some respects, in a different class from the positive

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unauthorised acts of the defendants. It seems to me that they will be properly chargeable with the arrears, as it cannot be determined whether the omissions were justifiable and excusable, or the reverse. And, for the same reason, I do not think they are chargeable with increased rentals. This was admittedly not a practical question during Mrs. Breen's lifetime, and on her death, in October, 1899, the plaintiff could at once have been appointed administrator, and have assumed the management of the estate.

It will, I think, be found that the great bulk of the payments disallowed, as well as of the items of surcharge, all belong to the period of Mrs. Breen's life, when the position of the parties was very different from that in which they stood after her death.

I think that justice will be done according to law if the accounts are adjusted as above indicated.

It was agreed by counsel at the argument that when a decision had been given on the principal questions at issue, the result should be worked out by them and embodied in the formal report.

Perhaps, however, the parties may now arrive at some settlement, which is much to be desired.

The referee, by his report in the matter of Emily Breen, a lunatic, dated the 8th December, 1908, found:—

1. That the committee received by and out of the personal estate and rents and profits, during the period commencing on the 16th January, 1893, and ending on the 11th October, 1899 (being the date of the death of the lunatic), the sum of \$6,181.77, and that the committee had paid or should have paid and was allowable for taxes, repairs, and interest up to the date of the death of the lunatic, in the aggregate the sum of \$6,181.77.

2. That there was due on the 20th January, 1893, by the lunatic to the committee certain amounts, including mortgages made by her, amounting to the sum of \$6,131.31.

3. That on making up the accounts of the committee credits were given, or should have been given, by the committee for payments on account of the said indebtedness and mortgages, leaving as a balance due in respect of the said indebtedness and upon the said mortgages, as of the 11th October, 1899, in all, the sum of \$4,666.22 for principal money and \$462.71 for interest to that date.

4. That the referee had not seen fit to allow to the committee any remuneration for their services as such, nor any allowance or

percentage upon the sums collected by the committee, nor any costs, fees, or expenses of bringing in and proving their accounts.

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The referee by his report in the redemption action dated the 10th December, 1908, found and reported: (1) that the plaintiff was entitled to redeem; (2) that there was due to the defendants for principal and interest the sum of \$3,281.08; (3) that he had appointed the 10th June, 1909, as the day for payment, and in default of payment that the action should be dismissed; (4) that he did not see fit to make any order as to costs.

The appeals and cross-appeals were heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 7th January, 1909.

*J. H. Moss*, K.C., for the defendants.

*J. D. Montgomery*, for the plaintiff.

MEREDITH, C.J. (at the conclusion of the argument):—There will be a reference back, both upon the appeals and the cross-appeals, with a declaration that the defendants are to be allowed for the expenditure upon the stable, if, upon the facts as found, a case is made which would have been sufficient to have obtained an order permitting the expenditure to be made, had an application been made to the Court for authority to incur it; and that the fact that the committee did not pass their accounts annually is not alone sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have been otherwise entitled to have allowed to them; and that the order is not to prejudice the right, if any, of the defendants to claim that they are not to be chargeable as committee, but as mortgagees in possession, in respect of their dealings with the property in question.

I think that, if it can be done without too much trouble, it would be desirable to have the accounts stated in both ways, that is, on the basis of an accounting as mortgagees in possession and an accounting as committee; because, if the Court should come to the conclusion that Mr. Moss's contention is right, and that his clients are chargeable only as mortgagees in possession, the case would be ripe for adjudication without the necessity of a reference back, if the accounts are taken on the basis of the defendants being liable as committee, and that is held to be the wrong basis.



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I do not express any opinion upon the plaintiff's cross-appeal or any dissatisfaction with the finding which is complained against, because I have not considered it.

I will reserve the costs to be dealt with by a Judge in Chambers after the final disposition of the matter, that is, after the confirmation of the report or after the appeal is disposed of, if there is an appeal from the report.

*Montgomery.* I wish to reserve the right, if it comes up again, to urge that the principle just enunciated by your Lordship is wrong in the case of the committee of a lunatic, as to the improvement of the stable. I do not wish to appeal from the order now in that respect, and I thought I should otherwise be precluded.

MEREDITH, C.J.:—I suppose that you would be precluded unless you appeal.

*Montgomery.* I think your Lordship might make it a term.

MEREDITH, C.J.:—Would it not be better to have that determined now?

*Montgomery.* Then I would ask leave to appeal from that.

*Moss.* There is no objection to a reasonable stay if my learned friend wants it.

MEREDITH, C.J.:—I suppose it would be reasonable that the order should not issue for ten days to allow Mr. Montgomery to appeal if he desires to do so.

*Moss.* It will have to be issued, but not to be taken into the Master's office.

MEREDITH, C.J.:—The committee exist for certain purposes. Why should not they make a formal application to the Court for an order *nunc pro tunc* allowing the expenditures objected to, for it may turn out that technically Mr. Cartwright is right—that he has not power to allow for them, because he is not a Judge of the Court. I will reserve, as far as I can, the right to the defendants to make such application to the Court as they may be advised in respect of these improvements.

The order made by MEREDITH, C.J., as drawn up and issued, was as follows:—

1. This Court doth order that the said reports be and the same are hereby vacated and set aside.

2. And this Court doth further order that it be referred back to

the referee, both upon the appeal and cross-appeals, to reconsider and retake the accounts herein.

3. And this Court doth declare that the Toronto General Trusts Corporation are to be allowed, upon the taking of the accounts, for expenditures made by them in connection with the erection of the new stable upon the premises in question, if, upon the facts as found by the referee, a case is made which would have been sufficient to have obtained an order permitting the expenditure to be made, had an application been made to the Court for authority to incur such expenditure before the same was actually made.

4. And this Court doth further declare that the fact that the committee did not pass their accounts annually is not alone a sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have otherwise been entitled to have allowed to them.

5. And this Court doth further declare that this order shall not prejudice the right, if any, of the said the Toronto General Trusts Corporation to claim that they are not to be chargeable as committee, but as mortgagees in possession, in respect of their dealing with the property in question.

6. And this Court doth further order that the costs of the said appeals and cross-appeals be disposed of by a Judge in Chambers after the final disposition of this matter by the confirmation of the referee's report, or after the final disposition of any appeal that may be taken from his report.

7. And this Court doth further order that an appeal may be taken from this order within fourteen days from the entry and service of a copy thereof.

The plaintiff appealed from this order, and his appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 26th April, 1909.

*J. D. Montgomery*, for the plaintiff, contended that the defendants should not be allowed for any expenditure made unless pre-authorized, and that the defendants, not having passed their accounts yearly, should not be allowed any remuneration for their services. He referred, in addition to some of the authorities cited by the Referee, to Con. Rule 766; Heywood and Massey's Lunacy

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Practice, 3rd ed. (1907), p. 519; *In re Langham* (1847), 2 Phillips 299; *Foster v. Marchant* (1684), 1 Vern. 262; *Ex p. Martin* (1805), 11 Ves. 397; *In re Way* (1861), 3 De G.F. & J. 175; *In re Swindell* (1852), 21 L.J.Ch. 748.

*J. H. Moss*, K.C., for the defendants. *In re Shaw*, 15 Gr. 619, cited by the Referee, is ample authority for the proposition that the Court has power to ratify expenditure made by the committee. The expenditure was for the benefit of the estate, and the power should be exercised. In the circumstances, the failure to pass the accounts was excusable, and the defendants should not be punished for not doing what was of no benefit to the estate.

*Montgomery*, in reply, referred to *Nicholson v. Tutin* (1857), 3 Jur. N.S. 235.

April 27. The judgment of the Court was delivered by BORD, C.:—*In re Brown*, 1 Macn. & G. 201, at p. 207, sanctions the form of inquiry which has been directed by the Chief Justice as to the expenditure in the erection of a driving shed. According to that case, the costs of such an inquiry, to some extent, if not altogether, fall upon the committee, who has acted without the intervention of the Court, and is, therefore, called upon afterwards to justify his course in operating the estate. But in principle the direction complained of in appeal is right, and should be sustained. See also *In re Churchill* (1839), 3 Jur. 719, to the same effect. This accords with the modern practice: *Tempest v. Ord* (1816), 2 Mer. 55.

In the circumstances of this case, it is perhaps better to have the referee reconsider the question of the costs of accounting and other allowances, and not proceed upon the view that the mere failure to account yearly should *ipso facto* disentitle, in analogy to Rule 766. If there is a good excuse for not accounting yearly, as, *e.g.*, the reasonable belief that the property had depreciated, or for some reason had become not worth what had been paid upon it by the trust company to clear it of the claims of mortgagees pressing for payment, and so a yearly accounting would be merely adding to the financial burden, that aspect may well be further considered by the official referee. Altogether, I do not think the order in appeal should be disturbed, and the costs of appeal will be further dealt with on the final report upon the estate.

Personally I may say that, had there been no question to go

back to the referee in regard to allowance for improvements, I should have been disinclined to disturb his ruling as to the costs of accounting, etc. See *Ex p. Clarke* (1790), 1 Ves. Jr. 156. I think the onus is still on the committee to satisfy the referee that costs and other allowances should be given, and in how far they should be given, notwithstanding the disregard of the order directing an annual passing of accounts.

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## [DIVISIONAL COURT.]

KINNEAR ET AL. V. CLYNE.

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*Receiver—Equitable Execution—Life of Judgment—Statute of Limitations.*

A judgment for payment of money was recovered by the plaintiffs against the defendant in 1883, and, nothing having been paid thereon, an order was made in 1892 appointing a receiver to receive the defendant's share or interest in the estate of his father, to the extent of the judgment. That interest was not available until the death of the defendant's mother, which did not occur until 1908; and it was then contended by the defendant that the judgment was barred under the Statute of Limitations, and the receiver should be discharged:—

Mar. 30.  
May 3.

*Held*, that the order for a receiver was in effect equivalent to a judgment for equitable relief, and gave a new point of departure for the Statute of Limitations, if that was material. But the statute had no application to the actual condition of affairs; the process of equitable execution had been current in respect of the debtor's possible assets, and nothing more could be done than to let the receiving order remain in *statu quo* till the death of the life-tenant and the survival of the reversioner made it possible for the machinery of the Court to become again active.

Order of TEETZEL, J., affirmed.

MOTION by the defendant, a judgment debtor, for an order discharging a receiver appointed at the instance of the plaintiffs, judgment creditors, to receive the defendant's share or interest in his father's estate under his father's will, to satisfy the plaintiffs' judgment.

The judgment was obtained on the 27th June, 1883. The receivership order was made on the 9th December, 1892. Nothing had been paid on the judgment; and the ground of the motion was that, the judgment being barred under the Statute of Limitations, all rights under the receivership order were also barred.

The motion was heard by TEETZEL, J., in Chambers, on the 12th February, 1909.



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*F. Arnoldi*, K.C., for the defendant.  
*N. Sommerville*, for the plaintiffs.  
*Featherston Aylesworth*, for J. J. Travers, the former solicitor  
for the plaintiffs, asserting a lien on the judgment.

Teetzel, J.

March 30. TEETZEL, J.:—The defendant's interest in his father's estate was not payable to him until after his mother's death, which did not occur until December last, and his interest was contingent upon his surviving her; it could not, therefore, have been realised under a writ of *fi. fa.* The appointment of the receiver was in the nature of equitable execution. The order authorises the receiver to receive the interest of the defendant in his father's estate to the extent of the judgment.

While the appointment of a receiver creates no lien or charge upon the property which he is to receive, and is not equivalent to a seizure in execution (*Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154), it is a proceeding in execution of the judgment, and operates as an injunction to restrain the debtor from dealing with the property to the prejudice of the judgment creditor. See *Tyrrell v. Painton*, [1895] 1 Q.B. 202; *In re Marquis of Anglesey, Countess de Galve v. Gardner*, [1903] 2 Ch. 727.

In *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157, Kekewich, J., at p. 70, in adopting the view that the effect of the order is to restrain the judgment debtor from doing anything to prejudice the claim of the judgment creditor, says: "I do not myself see how the Court, after restraining the defendant from himself receiving the property, can stop short of granting whatever injunction is necessary to prevent its being received by others."

Assuming, then, that the receivership order is in effect an injunction in aid of the realisation of the judgment, how can its life be affected by the Statute of Limitations?

The receiver is an instrumentality appointed by the Court, and is sometimes styled "the hand of the Court" to receive funds within its control.

The order appointing the receiver is in effect a judgment the vitality of which can only be co-terminous with the full accomplishment of the purpose for which it was pronounced. While the judgment recording the debt may expire by lapse of time, so that no new action or process in execution may be based

upon it, it does not follow that a judgment in the nature of a receivership order, which had its origin from it, must also die with it. If this were so, a receivership order made on the last day before the expiration of a judgment would only have force for that day.

Upon the death of the life tenant, no further process in execution is necessary to enable the receiver to be paid by the trustees of the father's will the share of the judgment debtor, or sufficient thereof to satisfy the judgment debt, a right which the receiver had at the date of the order, subject only to the removal of the legal impediment to execution: *Levasseur v. Mason & Barry Limited*, [1891] 2 Q.B. 73.

The application must, therefore, be dismissed with costs.

The defendant appealed from the order of TEETZEL, J., and the appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 29th April, 1909.

*F. Arnoldi*, K.C., for the defendant. The point is that the foundation of the order is gone, the judgment being barred by the Statute of Limitations. *Butler v. McMicken* (1900), 32 O.R. 422, shews that a judgment is barred after twenty years. See also *Chard v. Rae* (1889), 18 O.R. 371; *Boice v. O'Loane* (1878), 3 A.R. 167; *McCullough v. Sykes* (1885), 11 P.R. 337; *McMahon v. Spencer* (1886), 13 A.R. 430; *Price v. Wade* (1891), 14 P.R. 351. If the receiver was entitled at all, he was never in a better position than the sheriff with an execution. The order can have no higher effect than a writ. As to the nature of a receiving order, see *Salt v. Cooper* (1880), 16 Ch.D. 544; *McLean v. Allen* (1898), 18 P.R. 255. The appointment of a receiver is not equivalent to a seizure: *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *In re Sheppard* (1889), 43 Ch.D. 131, 138. A receiver may bring an action: *Mones v. McCallum* (1897), 17 P.R. 398. There may be an analogy between a receiving order and a writ of execution; the order can at least have no longer life than the writ. We are in the position defined in *Neil v. Almond* (1897), 29 O.R. 63. As to the duration of a writ, see *In re Woodall* (1904), 8 O.L.R. 288. Two English cases bear out the proposition that a receiving order cannot be used as an answer to a plea of the statute: *Harrison v. Duignan* (1842), 2 Dr. & War. 295, 301; *Wrixon v. Vize* (1842), 3 Dr. & War. 104, 123.

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*W. E. Middleton, K.C.*, for the plaintiffs and the receiver. The receiving order puts the judgment creditor in a different position from that of an execution creditor. It is not necessary for him to have execution in the sheriff's hands: *Stuart v. Grough* (1888), 15 A.R. 299. The receiving order is not yet twenty years old. It is a judgment: Con. Rule 835; *In re Potts*, [1893] 1 Q.B. 648; *Tyrrell v. Painton*, [1895] 1 Q.B. 202. Although the order is in the same action, it is in the nature of an ancillary decree: *Salt v. Cooper*, 16 Ch.D. 544. The order was made for the very purpose of operating only when the mother should die, and until then the right could not be enforced. *In re Sheppard*, 43 Ch.D. 131, shews that the order is not execution. See also *Weekes v. Frawley* (1893), 23 O.R. 235; *Flegg v. Prentis*, [1892] 2 Ch. 428; *Re Pope* (1886), 17 Q.B.D. 743; *Mones v. McCallum*, 17 P.R. 398; *Holmes v. Millage*, [1893] 1 Q.B. 551, 554.

*N. Sommerville*, also for the plaintiffs and receiver. The motion for a receiving order is in the nature of an action. Action is a wide word in our practice: see Con. Rule 6(e) and the Judicature Act, R.S.O. 1897, ch. 51, sec. 2(3). It is not included in the actions mentioned in R.S.O. 1897, ch. 72, sec. 1.

*Arnoldi*, in reply.

May 3. The judgment of the Court was delivered by BOYD, C.:—This appears to be the first case in which the question of the Statute of Limitations as affecting “equitable execution” has been brought before the Court. “Equitable execution” is a short way of saying that the Court has appointed a receiver by way of equitable relief in aid of a judgment at law. Before the Judicature Act this relief was obtained through an independent suit in Chancery; since then it may be summarily obtained by application in the original action wherein judgment has been given. The object of the plenary suit of old and the present order for a receiver is to give the creditor, if there be a legal impediment to his process of legal execution, the same benefit by equitable process which he would have had at law had no impediment intervened: Lord Cottenham in *Neate v. Duke of Marlborough* (1838), 3 My. & Cr. 407, 417.

The order for a receiver was rightly made in this case when the debtor had no property available for the ordinary writs of execution. He had only a reversionary interest in property,

subject to his surviving his mother. She having died some months ago, he for the first time has an estate that can be laid hold of by the receiver and applied for the satisfaction of the judgment. Pending the receivership, the debtor's interest was in the custody of the Court, in the sense that the order operates as an injunction against his dealing with the property to the prejudice of the judgment creditor, and the property remains "*in medio*" till it becomes, by satisfaction of the testamentary conditions, available in execution as the property of the judgment debtor. See, in addition to the cases cited by my brother Teetzel: *In re Harrison and Bottomley*, [1899] 1 Ch. 465; *Re Potts*, [1893] 1 Q.B. 648, 652; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Thompson v. Gill*, [1903] 1 K.B. 760.

In this case the order for a receiver was validly made in December, 1892, and that was in effect equivalent to a judgment for equitable relief, the same as if a suit in equity had been brought to a hearing with that result. That of itself gave a new point of departure for the Statute of Limitations, and twenty years have not since elapsed, assuming that lapse of time is a material factor. But I do not think it is, because the order for and the appointing of a receiver was the inception of equitable execution; it was doing all that was practicable to be done in the way of enforcing the fruits of the judgment; due diligence was exercised on the part of the creditors, and they are not to blame or to suffer if delay has unavoidably arisen before the debtor's interest in the property has come into possession.

The Statute of Limitations, in my opinion, has no application to this condition of affairs. The process of execution has been current in respect of the debtor's possible assets, and nothing more could be done than to let the receivership remain in *statu quo* till the death of the life-tenant and the survival of the reversioner made it possible for the machinery of the Court to become again active. I can see no propriety in law or in reason in asking the Court to discharge the receiver. He should be allowed to exercise the functions of his office, and collect the debtor's property, now first available for the satisfaction of the judgment debt and costs.

The judgment in appeal should stand affirmed with costs.

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## [DIVISIONAL COURT.]

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June 3.

F. J. CASTLE CO. LIMITED V. KOURI ET AL.

*County Court Appeal—Right of Appeal—Summary Order for Judgment if Money not Paid into Court—Order “in its Nature Final”—County Courts Act, sec. 52—Valid Defences—Unconditional Leave to Defend.*

An order made by the Judge of a county court, upon an application by the plaintiffs for summary judgment under Rule 603, allowing the defendants to defend upon condition of their paying money into Court, and directing that, in default of payment into Court, the plaintiffs be at liberty to sign final judgment, is “in its nature final and not merely interlocutory,” within the meaning of sec. 52 of the County Courts Act; and an appeal therefore lies from such an order to a Divisional Court of the High Court.

*Bank of Minnesota v. Page* (1887), 14 A.R. 347, followed.

*Rural Municipality of Morris v. London and Canadian L. and A. Co.* (1891), 19 S.C.R. 434, following the English decisions, distinguished.

Where valid defences are sworn to by the defendants in answer to a motion for summary judgment, unconditional leave to defend should be granted.

*Jacobs v. Booth's Distillery Co.* (1901), 50 W.R. 49, 85 L.T.R. 262, followed. Order of the Judge of the County Court of Carleton reversed.

APPEAL by the defendants from an order of the Judge of the county court of Carleton, in Chambers, upon an application by the plaintiffs for summary judgment under Rule 603, in an action in the County Court upon promissory notes, allowing the defendants to defend upon condition of their paying \$270 into Court, and in default of payment allowing the plaintiffs to sign final judgment for the amount indorsed upon the writ of summons.

The action was brought against “Norman Kouri and Moses Salloum, carrying on business under the name and style of Norman Kouri & Co., and the said Norman Kouri & Co.,” to recover \$273.52, the amount alleged to be due for principal and interest upon two overdue promissory notes, made by Norman Kouri & Co., payable to the order of one J. Jabour, and by him indorsed to the plaintiffs.

In support of the motion for judgment an affidavit of the secretary of the plaintiffs was filed, which verified the cause of action, and stated that the plaintiffs were the holders of the notes in due course; that at the time the plaintiffs took the notes from Jabour, the latter informed the deponent that the notes were given in part payment of lands purchased by the defendants from him for the purposes of their business, and that the members of the firm were Norman Kouri and Moses Salloum; that the deponent had on one or two occasions seen both Norman Kouri and Moses Salloum, and that both admitted that they were the members of

the firm of Norman Kouri & Co.; that the deponent believed that the defendants had no defence to the action, etc.

The plaintiffs also filed an affidavit of Jabour, who stated, among other things, that the members of the firm of Norman Kouri & Co. were Norman Kouri and Moses Salloum, as they had admitted to him.

In answer to the application, the defendants filed their own affidavits, in which they stated that Moses Salloum never was a member of the firm of Norman Kouri & Co., and that he did not at any time admit to Jabour or the secretary or any one that he was a member of that firm; that the notes in question were given without value and for the accommodation only of Jabour; that the notes were transferred to the plaintiffs after maturity; that the defendant Norman Kouri was under twenty-one years of age; and that the defendants never were in partnership.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 27th May, 1909.

*Featherstone Aylesworth*, for the defendants. The defendants swear to several valid defences, and should not be put on terms, but allowed to defend unconditionally. It is impossible for the defendants to pay the money into court, and, if the order is affirmed, they will be deprived of their right to defend the action.

*W. N. Tilley*, for the plaintiff. The county court Judge was right in imposing terms on the defendants, and his judgment should be supported on the merits. In any case the order made, being interlocutory and not final in its nature, is not appealable under sec. 52 of the County Courts Act. A judgment could not be issued on *præcipe* on the order; if default is made in payment into Court, a motion must be made to the Judge upon material shewing the default, for a direction that judgment be entered, which would not be necessary in the case of a final judgment. I refer to *Schroeder v. Rooney* (1885), 11 A.R. 673; *McVicar v. McLaughlin* (1895), 16 P.R. 450; *O'Donnell v. Guinane* (1897), 28 O.R. 389.

*Aylesworth*, in reply. Common sense shews that the order is final in its nature; and all the cases shew that the Courts pronounce strongly against taking away a defendant's right to his defence. If orders of this kind were encouraged, the result would be that defences would be stifled, which is contrary to the policy of the law.

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The case of *McVicar v. McLaughlin*, cited by the plaintiff, is really in the defendants' favour. I also rely on *Jacobs v. Booth's Distillery Co.* (1901), 50 W.R. 49.

June 3. The judgment of the Court was delivered by BOYD, C.:—The decisions on this question of jurisdiction are in a somewhat conflicting and unsatisfactory condition. Looking to the course of decision in England, adopted by the Supreme Court of Canada, an order such as this, directing final judgment to be signed unless money is deposited in Court by the defendant, would be deemed of an interlocutory character; but, according to the course of decision in the Court of Appeal for Ontario, it would be final in its nature.

The section to be considered, R.S.O. 1897, ch. 55, sec. 52, gives an appeal to a Divisional Court "from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory."

The question is, whether the order made in the county court is "in its nature final and not merely interlocutory." The order reads, if the defendants pay into court before the 1st May to the credit of the action, subject to further order, the sum of \$270, they be at liberty to defend this action, but, if not so paid, the plaintiffs be at liberty to sign final judgment. A final judgment is ordered unless the payment is made. No further action of the Judge is needed, except perhaps a direction to enter judgment upon the default. To my mind, apart from authority, this order is not merely interlocutory, but is final in its nature.

The Supreme Court in *Rural Municipality of Morris v. London and Canadian L. and A. Co.* (1891), 19 S.C.R. 434, decided that an order allowing judgment to be entered on a specially indorsed writ was not a "final judgment" within the meaning of the 28th section of the Supreme and Exchequer Courts Act.\* That Act defines the term thus: "'Final judgment' means any . . . order or decision, whereby the action . . . is finally determined and concluded." The Court followed the decisions of the English Courts as to interlocutory appeals in the Rules providing a limitation of fourteen days for such appeals. It was in these Courts held

\* R.S.C. 1886, ch. 135.

that an order empowering a plaintiff to sign judgment upon a specially indorsed writ was not a final but an interlocutory proceeding. In *Standard Discount Co. v. La Grange* (1877), 3 C.P.D. 67, Cotton, L.J., said: "Without using an exhaustive definition, it may be laid down that an order is interlocutory which directs how an action is to proceed; and the order before us is exactly of that kind:" p. 72. That is, no doubt, literally accurate, but it appears to me to be equally correct to say that such an order "in its nature" directs how the action is to end. Mr. Justice Strong, in the Supreme Court case, curtly says: "It is quite clear that such an order as was made in this case cannot be called a final judgment." Mr. Justice Patterson dissents in a well-reasoned judgment, and takes the position that the order was of a final character.

Under the English practice, the finality arises when the judgment is signed: *In re A Debtor* (1903), 19 Times L.R. 152. Were the English definition adopted, the procedure would be for the defendant to make default, allow judgment to be signed, and then, on the footing of a "final judgment," to make his appeal. But, as the judgment would be warranted by the order, and that was not appealed from, he might be precluded from asking relief.

I prefer to follow the law and the meaning of the particular language of our statute giving the appeal, as laid down in the Court of Appeal in *Bank of Minnesota v. Page* (1887), 14 A.R. 347, where an order to sign judgment was held to be "in its nature final and not merely interlocutory," passing thus upon the very words, which are different from those under consideration by the Supreme Court. Mr. Justice Osler, speaking for the Court, refers to the course of the Court as to entertaining such appeals (citing the cases), and says the "order is in its nature, if not in form, final . . . even though it has to be carried into effect by entering judgment in pursuance of it."

I follow this as a sound exposition of the section in the County Courts Act, and think this appeal is well lodged for disposal on its merits.

During the argument and at its close we expressed our view that the defendants had sworn to valid defences, and that upon the law as settled by the House of Lords in *Jacobs v. Booth's Distillery Co.*, 50 W.R. 49, 85 L.T.R. 262, there was a right of unconditional defence.

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D. C.            The order will, therefore, be vacated, with costs of appeal in  
 1909            the cause to the defendants. The defendants to have leave to  
 F. J. CASTLE defend unconditionally, and costs of motion below to be in the  
 Co. LTD.       cause.  
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                  KOURI.  
                  \_\_\_\_\_  
                  Boyd, C.

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## [DIVISIONAL COURT.]

D. C.

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June 5.

## CAMPBELL V. CANADIAN PACIFIC R.W. CO.

*Railway—Fire from Locomotive—Damage to “Standing Bush”—Conflicting Evidence—Findings of Jury—Dominion Railway Act, sec. 298—“Lands”—“Plantations”—Interpretation of Statutes.*

In an action brought under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, to recover the amount of damage caused to “standing bush” on the plaintiff’s land by a fire, alleged to have been started by a locomotive of the defendants, there was a conflict of evidence as to whether the fire which actually did the damage spread to the plaintiff’s land from a fire started by the defendants’ locomotive, or from a fire started on the land of one H.:—  
*Held*, that there was evidence to justify the written finding of the jury that the damage to the plaintiff’s property was caused by fire from the defendants’ locomotive, and that an apparently inconsistent oral response made by the foreman to a question put by the trial Judge was, on the evidence, reconcilable with the written finding.

*Held*, also, that “standing bush” comes within the provisions of sec. 298, being included in “lands,” notwithstanding the occurrence of “plantations” in the words of the enactment, “crops, lands, fences, plantations, or buildings and their contents.”

In regard to legislation of this kind, the rule is to adopt the construction most beneficial to the public: see sec. 15 of the Interpretation Act, R.S.C. 1906, ch. 1, sec. 15.

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for destruction of the plaintiff’s property by fire, alleged to have been started by sparks escaping from a locomotive of the defendants. The facts are sufficiently stated in the argument and judgment.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 26th May, 1909.

I. F. Hellmuth, K.C., and W. L. Scott, for the defendants. The action is brought under sec. 298 of the Railway Act. The plaintiff’s contention is that a fire on certain lots, which was admittedly caused by the defendants, spread to his lot and caused the damage complained of, while the latter contend that the damage was done

by a fire which originated on another lot (Hourigan's), and was not caused by the defendants. The jury found that it was the fire on Hourigan's lot which caused the damage, which is inconsistent with their finding that it was caused by the defendants. On the evidence the jury could not properly find the defendants liable, and the trial Judge should have entered judgment for them on the jury's finding that the fire started on Hourigan's lot. The damages were assessed at \$424, of which \$350 was for damage to "standing bush." Such damages cannot be recovered under sec. 298, which only covers damages to "crops, lands, fences, plantations, or buildings and their contents." The use of the specific term "plantations," which cannot apply to bush timber, excludes the wide general meaning which would otherwise be given to the term "lands:" Maxwell on Interpretation of Statutes, 4th ed., p. 489; *The King v. Inhabitants of Sedgley* (1831), 2 B. & Ad. 65; *Thursby v. Churchwardens, etc.*, of *Briercliffe-with-Extwistle*, [1895] A.C. 32. In the *Sedgley* case, the head-note states that the express mention of coal-mines in the statute 43 Eliz. ch. 2, sec. 1, is a virtual exclusion of all other mines, and the principle of the *Thursby* case is similar. In *Fraser v. Pere Marquette R.R. Co.* (1909), 13 O.W.R. 883, the Court of Appeal has held that the statute is to be strictly construed so as to include only such kinds of property as are undoubtedly designated by the terms used.

*R. A. Pringle*, K.C., for the plaintiff. The evidence sufficiently supports the finding of the jury that the fire which did the damage was caused by the defendants, and many cases shew that in such a case their verdict should not be interfered with. I refer to *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178; *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Connecticut Mutual Life Insurance Co. of Hartford v. Moore* (1881), 6 App. Cas. 644; *Metropolitan R.W. Co. v. Wright* (1886), 11 App. Cas. 152. "Lands" should receive its usual and natural construction as including the timber standing upon them. I refer to *Northern Counties Investment Trust Limited v. Canadian Pacific R.W. Co.* (1907), 13 B.C.R. 130; *Blue v. Red Mountain R.W. Co.* (1907), 6 Can. Ry. Cas. 219; *Grant v. Canadian Pacific R.W. Co.* (1904), 36 N.B.R. 528; *McNeill v. Haines* (1889), 17 O.R. 479.

*Hellmuth*, in reply, referred to *Ewer v. Hayden* (1594-7), 1 Cro. Eliz. 476, 658, followed in *In re Portal and Lamb* (1885), 30 Ch.D. 50.

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June 5. The judgment of the Court was delivered by BOYD, C.:—In September (two or three weeks after the fire started) Campbell saw the fire where it had crossed from Warner's to Hourigan's farm, about 300 feet north of the Payne river, and went across about 100 feet east of the line (*i.e.*, between the lots). It was burning slowly then. No fire had then crossed on Hourigan's, north of the Payne, though it was burning to the south of that creek at that time. This date is later than the 9th September, spoken of by the defendants' witnesses.

D. Grant was down fighting the fire, and to keep it from getting into the 4th concession. The fire was on the head-line between the 3rd and 4th concessions, and came from a south-westerly direction off the Warner and Hourigan lots, and coming from both properties. He was with Cameron, who says that the fire crossed the head-line on the 15th October about four o'clock. It crossed from Hourigan's place. According to this evidence, the fire started by the railway on Warner's place had crossed the creek to the north and worked into Hourigan's place (before the fire in Hourigan's place to the south had reached the creek). And this fire had between the middle of September and the middle of October worked up to the head-line between the 3rd and 4th concessions.

For the defence Warner says that there was a fire started on Hourigan's land on the 23rd August, about an acre distant from the railway, and extended north so as to cross Payne river or creek on the 9th September, and then burned slowly back (*i.e.*, north), and went over the head-line (between the 3rd and 4th concessions) on the 16th October. This fire, he says, went ahead of the Canadian Pacific Railway fire (*i.e.*, from Warner's), and that this fire went across the head-line into Cameron's bush.

Flanagan says Warner's fire was not across the creek on the 9th September, but was to the south of it (p. 25), and that there was no connection between Hourigan's fire and Warner's north of the creek that day.

Warner's evidence is subject to the observation that he had made a conflicting statement, before action, to the effect that he then thought or supposed that it was the Canadian Pacific Railway fire which caused the destruction.

But the evidence as it stands is directly contrary on this critical point, and it was for the jury to pass upon it. Taking the answers

to the questions, it is clear that the jury believed that the damage to the plaintiff was caused by fire or sparks from the railway. This, to my mind, is the controlling finding. Afterwards, upon their return to Court with the written answers, the foreman of the jury said, in answer to the Judge's question, "Did you find that the fire started on the Hourigan lot, or on the Barker, Hough, or Warner lot?" "On the Hourigan lot."

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I would not, on this conflicting evidence, allow that *vivâ voce* answer, on the spur of the moment, to overweigh the deliberate response in writing. Several explanations may be given of the oral response. The jury may have believed that the first fire of Hourigan's was put out, as he says, and that the later fire on his place was started by sparks from the locomotive. They may have adopted the view, even though Hourigan had not put out the fire, as he says, still that that fire originated from the railway's fires, though the place was an acre from the track. And, again, they may have accepted the evidence of the plaintiff and looked upon Warner's as the leading fire, which first went into Hourigan's north of Payne creek and then spread to the head-line and over into the 4th concession, and thence down on the plaintiff. This course of the fire is delineated on the plaintiff's plan, made by Mildren, P.L.S. All agree that the fire that devastated the plaintiff's land came from or out of Hourigan's bush to the north of Payne river, though it may not have "started" in Hourigan's. If the whole response is read thus, we find that the fire was caused by sparks allowed to escape from the locomotive of the defendants, which started in Warner's lot and burned up through Hourigan's lot, joining a fire on Hourigan's lot, also started by the company's locomotives, and from Hourigan's going over the 4th concession, and thence driven by the wind into the plaintiff's bush to the south of the concession. If so expanded, there is evidence to justify all these details.

Altogether, looking at the comparative smallness of the verdict and the nature of the evidence, no good result would follow from a further prolongation of the contest. A new trial in this kind of case is to be deprecated, and there is evidence to support amply the written findings, and sufficiently to support the oral answer of the foreman, which should be read so as to harmonise with the main finding.



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This leaves to be considered the question on the construction of the statute R.S.C. 1906, ch. 37, sec. 298.\* The argument is that "standing bush" is not covered by its language, which extends to damage "caused to crops, lands, fences, plantations, or buildings and their contents." Though it is conceded that "lands," standing alone, includes a forest thereon, yet, as trees of a particular kind are specified in the word "plantations," the recognised rules of statutory construction require us to hold that "standing bush" comes neither under the specific term "plantations" nor the general term "lands."

This is the argument, and cases are cited to support it. The cases cited are of a twofold character: (1) as to imposing of rates, *i.e.*, fiscal Acts; and (2) cases on the construction of wills. The latter authorities, as to wills, are not rightly available on the construction of statutes, in which not the individual but the public is speaking. In the former cases, as to taxation, statutes are always strictly construed so as not to impose payment unless the language is conspicuously plain. But in legislation of this kind, giving damages for injury to property by railways, the rule is to adopt the construction most beneficial to the public, and that rule of liberal construction is indeed expressly so declared as to our body of consolidated or revised statutes by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 15, by which such fair, large, and liberal construction and interpretation is to be given as will best ensure the attainment of the object of the Act, according to its true intent, meaning, and spirit. I hesitate to allow the unusual word "plantations" control, and reduce the large meaning of the word "lands" used in this section. So to do would appear to me to be invoking technicality to do away with the substantial advantages contemplated by the Legislature. "Plantation" means something planted out by the hand of man; a standing, *i.e.*, a growing, bush is something planted by the hand of nature, which is rooted in the soil and forms part of the land itself. Clearing land means removing the timber and trees thereon, and damaging land by fire would be damaging the trees, and, it may be, the soil itself. Cases turning upon the rating of

\* 298. Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction. . . .

property for the poor in the time of Elizabeth, upon which those cited to us were based, may not properly control recent legislation in this land of farms and forests, which are being injured by the passage of locomotives. "General words in a statute," says Sir William Grant, "must receive a general construction; unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment:" *Beckford v. Wade* (1811), 17 Ves. 87, 91. In *The Queen v. Justices of Liverpool* (1883), 11 Q.B.D. 638, Bowen, L.J., said: "We should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure . . . The Courts sometimes do violence to the language of an Act of Parliament in order to cure a mischief, but certainly they ought not to do violence to the language or to read it in an unnatural sense when the effect of so reading it would be to leave the mischief uncured, or to a great extent uncured:" pp. 649, 650.

I am content to leave the matter in this way, upholding the award of damages in respect of the bush land.

The appeal should be dismissed with costs.\*

E. B. B.

\*On the 21st June, 1909, leave to appeal from this judgment was given by an order of Moss, C.J.O., in Chambers, but the appeal was confined to the question arising under sec. 298 of the Railway Act.

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- Dec. 14. *Fixtures—Machinery Leased to Company—Annexation to Freehold—Rights of Lessor against Mortgagee of Company's Lands.*

Certain articles of machinery were leased by the plaintiff for one year to a manufacturing company, and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the plaintiff their lands, including these premises, with all the plant and machinery thereon, or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings in which they were placed, but all could be detached at a trifling cost, without doing substantial damage to the inheritance:—

*Held*, upon the evidence, that the articles were so annexed to the freehold as *primâ facie* to constitute them, as between the company and the defendant, fixtures; and, the defendant not being a party to the agreement between the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual hire-purchase agreement, afforded no evidence to alter the *primâ facie* character of the annexed property; and the plaintiff was not entitled to the articles as against the defendant.

*Hobson v. Gorringe*, [1897] 1 Ch. 182, and *Reynolds v. Ashby & Son Limited*, [1903] 1 K.B. 87, [1904] A.C. 466, applied and followed.

ACTION for the return of certain plant and machinery leased by the plaintiff to the Wilbur Iron Ore Company Limited, and taken possession of by the defendant as mortgagee from the company. The facts are stated in the judgment.

The action was tried before TEETZEL, J., without a jury, at Toronto on the 20th November, 1908.

*George Wilkie*, for the plaintiff.

*J. H. Moss*, K.C., for the defendant.

December 14, 1908. TEETZEL, J.:—The Wilbur Iron Ore Company Limited on the 20th February, 1908, executed a mortgage to the defendant for \$71,300 upon a large tract of land in the county of Lanark, "together with all buildings, erections, heating apparatus, plant, and machinery, whether movable or stationary, with the proper, usual, and necessary gear, connections, and appliances upon the said lands, or brought upon the said lands during the continuance of this mortgage, which are hereby declared to be part and parcel of the said real estate."

At the time of the mortgage there were upon the property an iron mine and a quantity of stationary and movable mining plant and machinery.

On the 12th March, 1908, the plaintiff and the said company entered into an agreement under which the plaintiff was to supply and deliver at the company's mine the equipment necessary for the successful operation of the mine, including boiler, compressor, etc., which equipment was by the agreement leased for one year, the company agreeing to pay a rental therefor of fifteen per cent. per annum upon the cost thereof, payable quarterly. The freight and cost of installation were to be paid by the company.

The plant was installed under the superintendence of the plaintiff, who by the agreement was employed as the company's consulting engineer for the term of one year.

On the 23rd August, 1908, an order was made to wind up the company; and on the 27th August the defendant, under his mortgage, took possession of the plant and machinery upon the mortgaged property, pursuant to an order made in the winding-up proceedings permitting him to do so, and having refused to deliver the property in question to the plaintiff, this action was brought for its recovery.

At the time of delivery of the plaintiff's equipment, there were on the premises plant and appliances capable of operating the mine on a very small scale, and the purpose of the additional installation was not to replace that plant, but to increase its capacity.

Four of the articles supplied by the plaintiff were a tubular boiler, an air-compressor, a receiver, and a pump, with their respective mountings; and as to these the defendant claims that when he took possession they were so annexed to the mortgaged premises as to become fixtures to the freehold.

The balance were admittedly loose chattels, and in the statement of defence the defendant says that upon their being identified as the plaintiff's property, and upon consent of the liquidator, the plaintiff may remove them.

Since the trial the plaintiff's agent has acknowledged receipt of the unattached articles.

I am of opinion that upon the evidence the four articles above mentioned with their mountings were so annexed to the freehold as *prima facie* to constitute them, as between a mortgagor and mortgagee, fixtures within the authorities. See particularly *Hobson v. Gorringe*, [1897] 1 Ch. 182; and *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335.

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I also find as a fact that all the said articles could be detached at a trifling cost, and that their detachment and removal would do no substantial damage to the inheritance, and also that for a sum not exceeding \$20 the plant, as it was before the plaintiff made the additions, could be re-connected and substantially restored to its former condition and made as efficient as it was before.

Notwithstanding that the articles in question, as between mortgagor and mortgagee, might *primâ facie* be regarded as fixtures, the plaintiff claims that under the circumstances of this case they should not be held to be fixtures as between him and the defendant.

As between the plaintiff and the Wilbur Iron Ore Company, I would have no difficulty, in face of the agreement, in holding that at the expiration of the year the plaintiff could call upon the company to return all the articles to him. The agreement was not a hire-purchase agreement, but a straight hiring of the property for one year without any right of purchase.

In *Reynolds v. Ashby & Son Limited*, [1903] 1 K.B. 87, affirmed in the House of Lords, [1904] A.C. 466, machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, the machines to remain the property of the owner until they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory, by bolts and nuts, and could be removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from the mortgagee of the premises, who had taken possession. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee.

It seems to me that this authority is conclusive against the plaintiff, unless a distinction can be drawn by reason of the agreement in this case giving no right of purchase.

In most of the authorities the right of the owner of the chattels to recover possession was under a hire-purchase agreement, but in none of them do I find that anything turned upon the question of the right of purchase being contained in the agreement.

Three rules of law applicable to this case seem to be well settled by the authorities above cited, *viz.*:—

1. That articles affixed to the land, even slightly, are to be

considered part of the land, unless the circumstances are such as to shew that they were intended to continue chattels.

2. That the intention of the person affixing the articles to the soil is material only so far as it can be presumed from the degree and object of the annexation.

3. That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

The difficulty in the plaintiff's way is the third rule, requiring that the circumstances necessary to be shewn to alter the *primâ facie* character of the articles must be patent to all to see, in the absence of an agreement between the parties inconsistent with the *primâ facie* character of the articles.

Now, it cannot be said in this case that the mortgagee was any party either to the agreement between the plaintiff and the Wilbur Iron Ore Company or to the installation of the equipment, nor is there any evidence that his consent to any of its terms was granted.

Both in *Hobson v. Gorringe* and *Reynolds v. Ashby & Son Limited*, the Court discussed very fully whether the terms of a hire-purchase agreement, retaining the property in the plaintiff and involving a right in the event of default in payment to resume possession, could be relied on to shew that the attachment of the machinery to the freehold was not intended to be permanent, and that the machinery had not become a fixture, but remained a mere movable chattel.

In *Hobson v. Gorringe*, [1897] 1 Ch. at p. 193, A. L. Smith, L.J., in delivering the judgment of the Court, said: "It is said that the intention that the gas engine was not to become a fixture might be got out of the hire and purchase agreement, and, if so, it never became a fixture and part of the soil, and it was said that the case of *Holland v. Hodgson* (1872), L.R. 7 C.P. 328, had so decided. For this point it must be assumed that such intention is manifested by the hiring and purchase agreement, though, as before stated, we think it is not. Now, in *Holland v. Hodgson*, L.R. 7 C.P. 328, Lord Blackburn, when dealing with the 'circumstances to shew intention,' was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation

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which was patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to to shew his meaning. He takes as instances (a) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (b) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to shew intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded."

In the Court of Appeal in *Reynolds v. Ashby & Son Limited*, [1903] 1 K.B. at p. 98, Collins, M.R., says: "Therefore the facts with regard to the hire-purchase agreement do not appear to be any evidence to rebut the presumption from such an annexation to the freehold as there was in the present case. That being so, there does not appear to be any evidence in the case to rebut that presumption."

The effect of these decisions is, therefore, clear, that, as against a mortgagee in possession, not a party to the hire-purchase agreement, such agreement affords no evidence to alter the *prima facie* character of the annexed property.

Then, if the facts with regard to a hire-purchase agreement would be no evidence to rebut the presumption which I have held to arise in this case by reason of the manner of annexation of these articles to the freehold, can it be said that a mere hire agreement is in any different position? I am unable to find that it is. I cannot see how in principle any distinction can be drawn for the purposes of this case between the effect of a hire-purchase agreement and a purely hiring agreement, in view of the above authorities. It comes, I think, within the expression "chance agreement" referred to in the judgment above cited, in *Hobson v. Gorringe*.

The result is one of great hardship upon the plaintiff, who, in consequence of a rule of law, has, contrary to his own intentions, presented to the defendant property said to be worth over \$4,000,

with no other relief than the privilege of proceeding against an insolvent company for indemnity, unless his misfortune (as I hope it may) appeals to the conscience of the defendant.

In the House of Lords, in *Reynolds v. Ashby & Son Limited*, both the Lord Chancellor and Lord Macnaghten intimated their dissatisfaction with the mode in which the case was disposed of. At p. 470 Lord Macnaghten said: "That the law with regard to fixtures as between mortgagor and mortgagee is perfectly satisfactory I should be sorry to affirm."

In this case I regret that by reason of the law as settled by the highest Court in the realm I am unable to do what I consider justice to the plaintiff, but it is not for me to make new law but to administer the existing law as I find it.

*Wake v. Hall* (1883), 8 App. Cas. 195, chiefly relied upon by Mr. Wilkie, as pointed out in *Reynolds v. Ashby & Son Limited*, turned entirely on a local custom, and cannot help the plaintiff.

*Ellis v. Glover & Hobson Limited*, [1908] 1 K.B. 388, being the latest case I have found on the subject, holds that, in the absence of express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises, provided they are removed before the mortgagee takes possession, but this right of removal ceases when possession is taken by the mortgagee. If, instead of being merely leased, these goods had been sold on special conditions, as in sec. 1 of the Act respecting Conditional Sales, R.S.O. 1897, ch. 149, the provisions of sec. 14 of ch. 13, 5 Edw. VII., might be successfully invoked in aid of the plaintiff. This section was not cited by plaintiff's counsel, and I think it has no application to a case like this.

In the result, therefore, the action will be dismissed; but the plaintiff having succeeded in recovering a portion of the property sued for, I will not award costs at present, but the matter may be spoken to again.

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*Landlord and Tenant—Building Lease—Settled Estate—Order of Court Authorising Lease Subject to Approval of Master—Lease Executed with Covenant for Renewal—Rental to be Fixed by Master—Order of Court Transferring Powers of Master to Referee—Award of Referee Fixing Rental—Waiver of Terms of Lease—Informal Submission to Arbitration—Jurisdiction of Referee—Objections to Award—Reimbursement of Lessee for Buildings—Expenditure by Lessee—Potential Value of Property.*

The lessor, the devisee of land "during his natural life and for him to leave it to any of his children he may please," agreed to lease it; and an order was made by the High Court on the 29th September, 1884, under certain Imperial statutes and R.S.O 1877, ch. 40, sec. 85, declaring that it was proper and consistent with a due regard to the interests of the parties entitled or to become entitled under the will containing the devise, that leases of the land should be authorised, but for periods not exceeding, with renewals, 99 years, and directing that a proper lease should be executed, being first approved of by a Judge or the Master in Ordinary, upon notice to the official guardian, and that such lease should be binding on all persons claiming under the will. Thereupon, with the approval of the Master in Ordinary, a lease was executed for 21 years from the 1st January, 1886, containing a covenant for renewal, subject to the approval of the Master in Ordinary, for a further term of 21 years, and at a rental to be fixed by the Master. By an order of the High Court of the 20th May, 1907, the powers conferred upon the Master by the former order were transferred to an official referee, and it was declared that it should be lawful for the latter to do all acts and exercise all powers which it would be lawful for the Master to do or exercise in pursuance of the former order. The referee then proceeded, in the presence of all parties and without objection, to determine the rental upon evidence, and made an award fixing the amount of the rental for a renewal term:—

*Held*, that the lease, though approved by the officer of the Court, was a contract between the parties thereto, and the provisions as to renewal as much a contract as any other part; the proper officer to fix the rental was, therefore, the Master, the express contract not being varied by the order of 1907.

But there was nothing to prevent the parties waiving the terms of the contract and agreeing that, instead of the Master fixing the rental, the referee should do so; no formal submission, either oral or written, was necessary; what was done amounted to an informal agreement or submission that the referee should act as arbitrator and fix the rental; and therefore an objection to his award, on the ground that he had no jurisdiction, failed.

Objections to the award, that the referee should have provided for the reimbursement in whole or in part of the lessee for the buildings, and that he should not have fixed a rental which would imply the expenditure of a considerable sum of money by the lessee, were overruled.

It is not improper in fixing a rental to take into consideration the potential value of the property.

MOTION by the lessee under a lease of lands for 21 years from the 1st January, 1886, with a covenant for renewal, by way of appeal from or to set aside the report or award of James S. Cartwright, official referee, dated the 20th July, 1908, fixing the rental to be paid upon a renewal of the lease. The facts are stated in the judgment.

The motion was heard by RIDDELL, J., in the Weekly Court, on the 12th November, 1908.

*R. McKay*, for the lessee.

*McGregor Young*, K.C., for the lessor.

*F. W. Harcourt*, K.C., for the infants.

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November 16. RIDDELL, J.:—The late G. T. D. by his will devised to his son C. L. D. certain property “during his natural life and for him to leave it to any of his children he may please,” etc. C. L. D. agreed to lease the said property or part of it to W. J. F. and W. H. B. The Chancery Division of the High Court of Justice, by order of the 29th September, 1884, under the Imperial Acts 19 & 20 Vict. ch. 120, 21 & 22 Vict. ch. 77, and 27 & 28 Vict. ch. 45, and the Provincial Act R.S.O. 1877, ch. 40, sec. 85, declared that it was proper and consistent with a due regard to the interests of the parties entitled or to become entitled under the will already spoken of, that leases should be authorised of the land agreed to be leased, but for periods not exceeding, with renewals, 99 years; and the Court further ordered that a proper lease should be executed by C. L. D., upon being first approved of by a Judge or the Master in Ordinary, upon notice to the official guardian, and that such lease should be binding on all persons claiming under the said will. Thereupon, with the approval of the Master in Ordinary, a lease was executed by C. L. D. to W. J. F. and W. H. B. for 21 years from the 1st January, 1886, at a rental of \$67.50 per annum. The lease contained a covenant for renewal “at the request to be given in writing not less than three months before the end of the term . . . but subject to the approval of the said Master in Ordinary . . . for a further term of 21 years . . . and at a rental to be fixed by the said Master, on evidence to be adduced before him, upon notice to the official guardian.”

By order dated the 20th May, 1907, my brother Anglin directed “that the powers conferred upon the Master in Ordinary of the Supreme Court of Judicature by order herein of the Chancery Division of the High Court of Justice, bearing date of Monday the 29th day of September, A.D. 1884, be and the same are hereby transferred to James S. Cartwright, esquire, official referee, and it shall be lawful for the said James S. Cartwright to do all acts

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and exercise all powers which it would be lawful for the said Master in Ordinary to do or exercise in pursuance of the said order."

Notice having been duly given by the present lessee, Mr. Cartwright proceeded, in the presence of all parties and without objection, to determine the rental upon evidence; and ultimately made an award fixing the rental at \$630.

A motion is now made "by way of appeal from the report or award of James S. Cartwright, bearing date the 20th day of July, 1908, and to set aside the said report or award," upon various grounds. It was agreed that the only ground upon which I should hear argument was the first, namely, that Mr. Cartwright had no jurisdiction to make the award.

The various statutes referred to, no doubt, give great powers to the Court, but I do not think there is any necessity in this case to consider these powers critically or at all. The lease, though approved by the officers of the Court, is a contract between the parties thereto, and the provisions as to renewal are as much a contract as any other part. The express contract provides that the rental is to be fixed by "the said Master, *i.e.*, the Master in Ordinary already mentioned; it does not provide that this rental is to be fixed by the gentleman who may be vested with the powers given "the said Master" by the order of the 29th September, 1884. Whatever difficulty there might be, were the office of Master in Ordinary abolished, or had it changed incumbents, there is none in fact, the office subsisting and being filled by the same individual. The express contract is not at all varied; and I think it clear that the proper officer to fix the rental was the Master in Ordinary. This, however—term as it is in the indenture of lease—may be waived by the parties interested. The arbitrator is a person agreed upon by the parties, and is not a court. The proceedings were not, in the usual sense of the phrase, *coram non judice*. Mr. Cartwright was not, acting as he was, a *judex* at all (except, indeed, in the sense of the word in the Roman law). Such cases as *Farquharson v. Morgan*, [1894] 1 Q.B. 552, have no application here. No doubt, parties cannot by acquiescence, express or implied, give a court jurisdiction; but there is nothing to prevent the parties interested agreeing that, instead of one man fixing a rental, another may do so. The law is very old that no formal submission, either verbal or written, is necessary:

Bac. Abr., Arbitr. B.; and I cannot look upon what was done here as anything else than an informal agreement that Mr. Cartwright should act as arbitrator, and himself fix the rental, instead of referring the matter to the Master in Ordinary.

The applicant not only did not object to the proceedings before Mr. Cartwright, he not only cross-examined witnesses for the landlord, but he also called witnesses on his own behalf; and it was not until the award was found not to be such as he hoped for, that any objection was made. Unless it was impossible to give Mr. Cartwright jurisdiction, this manner of acting was a "submission to arbitration" by him. The Court has had occasion recently to consider objections based upon irregularities in which the objector has participated; such are always looked upon and rightly looked upon with disfavour. And I am glad that in this case I find no law to compel me to give effect to the objection urged.

Had the award been a mere nullity, the question would have arisen whether the Court would interfere—the thoroughly established rule being that if the award be altogether bad, and can be considered a nullity, and nothing can be done upon it but by suit, the Court will not usually interfere to set it aside: Russell on Awards, p. 668.

The question whether anything could be done under this award so as to bring the case within *Doe d. Turnbull v. Brown* (1826), 5 B. & C. 384, would then have to be determined. In the view I take of the case, it is not necessary to consider this.

So far as the ground now under consideration is concerned, the application will be dismissed; if the appellant desires to press any other ground, I shall hear the parties in my Chambers on Saturday morning the 21st November, at 10 a.m. If there be no further argument, the motion will be dismissed with costs; and in any case the applicant will pay the costs of this part of the motion.

Argument upon other grounds was heard on the 21st November, 1908.

*R. McKay*, for the lessee.

*McGregor Young*, K.C., for the lessor.

*M. C. Cameron*, for the infants.

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November 25. RIDDELL, J.:—The applicant desiring to press his motion upon other grounds after my disposal of the objection as to the jurisdiction of Mr. Cartwright, I heard argument.

It is argued that this is really an appeal, and *In re Army and Navy Clothing Co. of Toronto* (1901), 3 O.L.R. 37, is cited as an authority for that contention. In that case the appeal was dismissed upon the merits, and Mr. Justice Osler was the only Judge of the five who sat who says anything as to the competency of the appeal. In any case, the case at present under consideration and that are not quite the same.

But, granting that that case is an authority that the appeal there was competent, and granting also that the decision governs me here, so that an appeal lies, I do not think the motion can succeed. I am not to interfere unless I can say that the referee is wrong.

The two main grounds urged are: (1) the referee should have provided for reimbursement in whole or in part to the lessee for the cost of the buildings; and (2) he should not have fixed a rental which would imply the expenditure of a considerable sum of money by the lessee. Not being favoured with the reasons for the referee's decision, I cannot say that he has not done as the applicant thinks he should have done. But, if not, it is impossible to say that he has gone wrong.

Though he may not have taken into consideration the fact that the buildings such as exist at the close of the tenancy will become the property of the landlord, it must be borne in mind that there is no certainty, perhaps no likelihood, that the tenancy will come to an end 21 years from the present time. The tenant has the right of renewal, and it may well—and probably will—be that the tenant will continue to own these buildings for many years more. It is possible that there will be no buildings at all at the end of the present term or of the whole tenancy, and it would not be reasonable to compel the landlord to pay for what he may not get and has no means of compelling the tenant to give him.

Then I do not think it is improper, in fixing a rental, to take into consideration the potential value of the property; the land-

lord is entitled to a rental fairly based upon the value which the property may fairly be made to assume.

*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, is not unlike in principle. There the city was obliged to pay a sum based upon the potential value of the land. Here it is said that to do so would be to imply that the lessee now has, or can readily obtain the money necessary to put up the buildings; but the same argument could have been used with equal force in the *Macpherson* case, and I do not think that the fact—if it be a fact—that the lessee is poor and cannot raise the money can have any influence. A landlord should not be compelled to rent to a poor man at a rate less than he can obtain from one who is wealthy.

If this implies (which I am far from admitting) that the law presumes that every man can raise all the money he needs or can make good use of, it is no more absurd than many other presumptions of the law which have been girded at, but which are still such as decisions are based upon.

I see no ground upon which the award can be interfered with; the motion should be dismissed with costs.

G. G.

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[IN CHAMBERS.]

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REX v. NELSON.

Nov. 16.

*Criminal Law—Warrant of Commitment—Failure to Recite Conviction—Habeas Corpus—Motion for Discharge—Application by Attorney-General for Certiorari—Right to, ex Debito Justitiæ—Adjournment of Motion—Practice—Invalid Warrant—Power to Amend—Discharge—Stay—Terms.*

The defendant was imprisoned under a warrant of a police magistrate, directed to a constable and the keeper of the gaol, reciting that the defendant was charged before the magistrate for unlawfully selling, at a place and on a day named, intoxicating liquor, and reciting an information for a third offence against the Liquor License Act, and then, without any allegation of a conviction, commanding the defendant's conveyance to the gaol and detention there at hard labour for six months. The defendant procured a writ of *habeas corpus*, declining a *certiorari* in aid. Upon a motion made for the discharge of the defendant, counsel for the Attorney-General appeared and asked for a *certiorari* to bring up the papers. This was granted, subject to all objections, and the motion for discharge adjourned till the return of the *certiorari*:—

*Held*, that the Attorney-General is entitled to a *certiorari* of absolute right and absolutely in all cases; and that the recent statute 8 Edw. VII. ch. 34 (O.) and the corresponding Rules do not affect such right.

*Held*, also, that there was power to adjourn the motion, and that the proper practice was followed.

*Held*, however, that the warrant was bad, and could not be cured or amended under sec. 1123 of the Criminal Code, R.S.C. 1906, ch. 146, nor under sec. 105 of the Liquor License Act, R.S.O. 1897, ch. 245.

The defendant was entitled to be discharged, and the discharge should not be stayed for a new warrant, nor should terms be imposed.

Remarks on the necessity for attention by magistrates and others to the form of proceedings, especially in matters involving the liberty of the subject.

MOTION by the defendant, upon the return of a *habeas corpus*, for an order for his discharge from custody under a magistrate's commitment. The facts are stated in the judgment.

The motion was heard by RIDDELL, J., in Chambers, on the 13th November, 1908.

*J. B. Mackenzie*, for the defendant.

*J. R. Cartwright*, K.C., for the Attorney-General.

November 16. RIDDELL, J.:—Alexander Nelson is imprisoned in the common gaol at Toronto under a warrant directed "to the constable of . . . , and to the keeper of the common gaol at Toronto, in the said county of York." The warrant recites that the defendant was charged before Peter Ellis, the police magistrate in and for the city of West Toronto and one of His Majesty's justices of the peace for the county of York, for unlawfully selling at West Toronto, on the 17th September, 1908, in-

toxicating liquor; "and the informant says that the offence hereinbefore first charged against the said Alexander Nelson is his third offence against the Liquor License Act." The document then, without any allegation of a conviction, goes on to command the defendant's conveyance to the gaol and detention there at hard labour for six months. This is, of course, one of those instances of inadvertence or carelessness so common, in which officials neglect the plain forms specifically and plainly provided for them.

The defendant procured a writ of *habeas corpus*, declining a *certiorari* in aid.

Upon motion before me, on Tuesday the 10th November, for the discharge of the defendant, counsel for the Attorney-General appeared and asked for a *certiorari* to bring up the papers. I considered that the Attorney-General had the right *ex debito* to such an order, and, even had I not thought so, it was, in any event, a case for such an order if I had the power to make it. I granted the order, subject to all objections, and enlarged the matter till Friday the 13th November. Upon that day the *certiorari* had been obeyed, and the motion for discharge was renewed.

Notwithstanding the argument of the defendant, I am of opinion that the Attorney-General is entitled to a *certiorari* "of absolute right" and "absolutely in all cases:" Paley on Convictions, 7th ed., p. 356. (Whether, having taken the writ, he may have any advantage of it upon this motion may be another question.) And I am further of opinion that the recent statute (1908) 8 Edw. VII. ch. 34 (O.) and the corresponding Rules do not affect such right.

The case must be considered as though the defendant had actually been brought before the Court on Tuesday; and that then, notwithstanding his protest, he not having asked for a *certiorari*, the Attorney-General procured a *certiorari*, and the case was adjourned until the Attorney-General had had the *certiorari* executed. If it had been the case of the Attorney-General, not having previously moved for such writ, attending and arguing the matter, and then saying that it was probable the conviction was a good one, and on that ground asking for a *certiorari*, the authority of *In re Timson* (1870), L.R. 5 Ex. 257, would be conclusive in favour of the defen-

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dant. See also *Regina v. Chaney* (1838), 6 Dowl. 281. But that is not what happened; the Attorney-General did not attempt to support the warrant as it stood; but asked that the matter might stand over that all the material might be brought before the Court. I think I had the power to adjourn the case, and that I followed the proper practice in doing so: *The King v. Taylor* (1826), 7 D. & R. 622, at p. 624; *The King v. Rogers* (1822), 1 D. & R. 156; *Regina v. Lavin* (1888), 12 P.R. 642.

But the section in the *Lavin* case, which is now sec. 1123 of the (Criminal Code) R.S.C. 1906, ch. 146, simply provides that "no warrant of commitment . . . shall be held void by reason of any defect therein, if it is therein alleged that the person had been convicted, and there is a good and valid conviction to sustain the same." In the *Lavin* case there was an allegation that the defendant had been convicted; here there is not; and I cannot apply that section. Nor do the provisions of the Liquor License Act, R.S.O. 1897, ch. 245, sec. 105 (1), assist: it cannot "be understood from . . . the warrant . . . that the same was made for an offence against some provision of this Act." Nor sub-sec. (2): the application is to be disposed of on the merits "notwithstanding any such variance or defect as aforesaid," *i.e.*, in form or substance. But the application here is for discharge by reason of the non-existence of a valid warrant of commitment—and that is disposed of on the merits by an examination of the warrant, and so determining whether it is fairly sufficient to justify detention. And, whether the merits of the offence charged have been tried or not, this warrant is not "sufficient or valid under this section or otherwise" so that it "shall not be quashed." I cannot, as I read the section, myself amend the warrant, as it does not answer the requirements of sec. 105 (1). The warrant as it stands is clearly bad: *In re Laverne Beebe* (1863), 3 P.R. 270; *The Queen v. Patrick Boyle* (1868), 4 P.R. 256; *In re Timson*, L.R. 5 Ex. 257.

I express no opinion as to the effect of a new warrant, if such be made by the police magistrate; but I do not think I should stay the discharge of the defendant, so far as the detention is based upon the warrant brought up in answer to the *habeas corpus*.

It has recently been decided that in cases of this kind there is no power to impose terms, and I should not do so if I could.

As was said in *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, at p. 341: "We must not look for ideal accuracy, for literal compliance with directions—it is a rare occurrence that an officer will do exactly what he is told, in exactly the way he is told to do it. No matter how carefully directions may be given, given in writing, repeated, and re-repeated, it is practically hopeless to expect them to be precisely complied with. In this work-a-day world we must not be too particular—we must be satisfied with substantial compliance with directions."

But it cannot be too much to expect a paid, salaried magistrate of a large and populous territory to pay some attention to form, especially in a matter involving the incarceration for months of a fellow-citizen.

G. G.

[RIDDELL, J.]

HESSEY v. QUINN.

*Lease—Condition for Reduction of Rent—Hotel Property—Total Prohibition of Sale of Intoxicating Liquors—Consent of Provincial Secretary—8 Edw. VII. ch. 54, sec. 11 (O.)*

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April 13

A lease to the plaintiff of an hotel business in Orillia contained a proviso that "in the event of any law being enacted . . . which shall prohibit the sale of intoxicating liquors upon the demised premises" the lessor shall make a reasonable reduction in the rent. A local option by-law was passed in Orillia in February, 1908, prohibiting the sale of liquor from and after May 1st, 1908, but was quashed in June, 1908. Meanwhile, in April, 1908, 8 Edw. VII. ch. 54 (O.) was passed, which, by sec. 11, prohibited under such circumstances the issue of the necessary license without the written consent of the Provincial Secretary, who refused it:—

*Held*, that until such consent was obtained there was a law prohibiting sale within the meaning of the above proviso, and the plaintiff was entitled to a rebate in his rent.

THIS was an action tried before RIDDELL, J., without a jury, at the Barrie Assizes, on April 6th, 1909. The circumstances of the case are fully set out in the judgment.

*F. E. Hodgins*, K.C., and *J. T. Mulcahy*, for the plaintiff, contended that the provision in the lease (referred to in the judgment) covered both total and partial prohibition, and referred to *In re Duncan and Town of Midland* (1907), 16 O.L.R. 132.

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A. E. H. Creswicke, K.C., for the defendants, contended that the said provision only covered total prohibition, and that there was not total prohibition here, as sale by wholesale was still permitted.

*Hodgins*, in reply, referred to *Simpson v. Guttridge* (1816), 1 Madd. 609; *Doe dem. Hayes v. Sturges* (1816), 7 Taunt. 217.

April 13. RIDDELL, J.:—James Quinn, by his will, left all his real and personal estate to his executrix, Mary Wilson Quinn, and his executors, G. I. Bolster and William Grant, in trust, first, to pay debts, etc., and, “in the second place, to hold the same unto and to the use of my said wife, Mary Wilson Quinn, for and during the term of her natural life.” Upon her death the remainder was to be divided amongst his children in such proportions as the wife should by will appoint, and, in default of appointment, equally (with one exception not necessary to mention here). “My said executors and the survivors and last survivor of them shall have full power and authority to mortgage, sell, lease and otherwise generally deal with . . . all or any part of my property . . . .” James Quinn died in 1898. Probate was granted to all three.

On May 15th, 1899, an indenture, in pursuance of the Act respecting Short Forms of Leases, was engrossed in duplicate—the parties being the said executrix and executors of the first part and the plaintiff herein of the second part. This was executed by Mrs. Quinn, Mr. Grant, and the plaintiff, but the other executor, Mr. Bolster, did not execute the indenture. The property leased was part of the real estate passing under the will. It was a hotel in Orillia; the term was ten years from May 1st, 1899; the rental \$1,200 per annum: “Provided that in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition: Provided that the lessee, his heirs and assigns, shall, during the existence of this lease and any renewal thereof, carry on the business of hotelkeeping therein and conduct same, under the name of the ‘Orillia House,’ for the entertainment of the travelling public.”

The plaintiff went into possession and so continues. He has kept the premises as a hotel. A by-law was passed by the town of Orillia, in 1908, prohibiting the sale of liquor in taverns and shops. This, after being sustained by the Chief Justice of the Common Pleas, was quashed by a Divisional Court: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317. A motion for leave to appeal to the Court of Appeal was dismissed by Mr. Justice Osler (1908), 12 O.W.R. 650, as such an appeal would be a needless appeal, the Provincial Secretary having refused his consent to the issue of licenses, under the provisions of sec. 11 of 8 Edw. VII. ch. 54 (O.)\* This dismissal of the motion for leave to appeal took place in September, 1908, and in November, 1908 [the certified copy of the pleadings makes this date November 6th, 1909], this action was begun.

The tenant is the plaintiff; the defendants, Mary W. Quinn and John A. Quinn, executors of last will of James Quinn, deceased. By order of the Court made in 1907, it was ordered and adjudged that "John Alexander Quinn be and he is hereby appointed an executor and trustee of the said estate, in the place of and in substitution for the said William Grant, and that the estate be vested in Mary Wilson Quinn and John Alexander Quinn, subject to the trusts of the said will. . . ." As to what has become of G. I. Bolster and what his relations to the estate, we are not informed. The plaintiff claims a declaration as to the amount of rent payable by him. The defendants set up that the lease has not been duly executed and is void, and, therefore, the plaintiff is only a tenant from year to year; that no law has been enacted prohibiting the sale of intoxicating liquors upon the premises; and asks a dismissal of the action.

The defendants are willing to take the premises off the plaintiff's hands, but not to reduce the rent. The plaintiff is willing

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\* 8 Edw. VII. ch. 54, sec. 11: The Liquor License Act is amended by inserting therein the following section:—

143 (a). Where a by-law submitted to the electors under the provisions of sub-sec. 1 of sec. 141 of this Act is declared by the clerk or other returning officer to have received the assent of three-fifths of the electors voting thereon and is after such declaration quashed or set aside, or held to be invalid or illegal . . . no tavern or shop license shall be issued in the municipality in which the by-law was submitted after the date of such submission and until the first day of May in the year in which a repealing by-law might have been submitted to the electors had the first mentioned by-law been declared valid without the written consent of the Minister first had and obtained . . .



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to pay a reduced rent, but not to give up the hotel. Both agree that the facts as to the by-law, etc., are as set out in the reports already referred to in 17 O.L.R. and 12 O.W.R.

I do not think it necessary to pass upon the question as to the effect of the indenture, the third lessor not having executed. The cases cited for the plaintiff, however, have no application: *Simpson v. Guttridge*, 1 Madd. 609, 616; *Doe dem. Hayes v. Sturges*, 7 Taunt. 217. These are cases in which one executor has dealt with personal property—i.e., a term of years—and not with real property, by granting a term of years. Of course, executors under the law of England have nothing to do with real estate as executors.

By our law the estate vested in the three executors named, but the will itself makes them trustees. At the time of the making of the lease, and now, the beneficial owner of the property was and is Mary Wilson Quinn. The executors would not have been permitted to make a lease of this property without her consent: *Lewin on Trusts*, 10th ed., p. 708. She executes the lease and covenants for quiet enjoyment. She is the owner in equity for her life, and at least during her life the lease is valid and effective.

The action is sufficiently framed for a declaration under the present circumstances.

As to the facts, a "local option" by-law was passed February 8th, 1908, which had the effect (assuming its validity) of preventing the sale of liquor from and after May 1st, 1908. This by-law was valid until it was set aside June 29th, 1908. In the meantime an Act was passed—April 14th, 1908—which gave even to this invalid by-law the status of a condition preventing the issue of a tavern license to the plaintiff without the written consent of the Minister: 8 Edw. VII. ch. 54, sec. 11 (O.) Without such license a sale of liquor by the plaintiff in the ordinary method of selling liquor in a hotel is illegal. This "law"—8 Edw. VII. ch. 54, sec. 11 (O.)—has been enacted since the lease, and it does most effectively prohibit the sale of intoxicating liquors upon the demised premises by preventing the delivery to the plaintiff of that without which he cannot legally so sell.

It is true that this prohibition may be removed by the written consent of the Provincial Secretary being obtained; but unless and until such written consent be obtained there is a law prohibiting sale.

It is unnecessary to consider whether any sale of any kind might be made by the plaintiff. The lease must be construed in view of the property leased and the intent of the parties—and it is quite clear what the parties meant by prohibiting “the sale of intoxicating liquor upon the demised premises.”

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The plaintiff is entitled to a “reasonable rebate on the rent” during the time he is prohibited by law from selling.

It is a matter of indifference whether this rebate be considered as a part of the rent secured by the lease being returned to the lessee upon his paying the full sum, or, what is more probable (“rebate” being defined as “an allowance by way of discount or drawback,” “a deduction from a gross amount”), as an amount to be retained by the lessee out of the gross amount secured by the lease.

I do not find any difficulty in the principle that the rent must be a profit certain or capable of being reduced to a certainty by either party: Woodfall on Landlord and Tenant, 18th ed., p. 438. Here the amount of rent as fixed by the instrument is certain, so that the lease is effective; and there is nothing to prevent the lessors agreeing to reduce the rent by any sum, so long as such an agreement would be valid between parties under different relations from those of landlord and tenant. Nor does the difficulty arise which might had the agreement to reduce the rent been merely oral: *Crowley v. Veltz* (1852), 7 Exch. 319. It could scarcely be argued that an agreement to pay or deduct a reasonable sum is too indefinite to be enforced. Here the equitable owner of the property—the same person who is entitled to the rent—has agreed to make a reasonable rebate under circumstances which have happened. I think she must do so. It will be referred to Mr. Cotter to inquire what such reasonable rebate will amount to. The defendants will pay the costs up to and including judgment. Further directions and costs reserved until after report.

A. H. F. L.

## [DIVISIONAL COURT.]

D. C.

FANCOURT V. HEAVEN.

1909

June 14.

*Malicious Prosecution—Reasonable and Probable Cause—Initiation of Criminal Proceedings—Further Prosecution after Reason for Doubt as to Identity of Offender—Submission to Jury—Withdrawal of Charge—Favourable Termination of Prosecution.*

Though reasonable and probable cause may exist at the initiation of a prosecution, yet, if it afterwards appears that there is good reason to doubt whether the charge is well founded, the private prosecutor should make reasonable inquiry to clear the doubt, and, if he has obvious means of finding out that the charge is not well founded, he should relinquish the matter or do what he can to dis sever himself from its further prosecution.

Goods obtained from the defendant by fraud were sold to B., and upon the fraud being discovered, the defendant and B., after going over all the events of the transaction, concluded that the plaintiff, who, as an expressman, had called for and delivered the goods, was the guilty one; the defendant laid an information against the plaintiff, and, on the latter being arrested and brought up for identification in presence of the defendant and B., B. declared that the plaintiff was not the man who sold the goods. The only excuse given by the defendant for not then interfering and letting the police know that there was some mistake was that he did not consider that it was his duty to stop further proceedings, and that the matter was in the hands of the police:—

*Held*, that the defendant's non-intervention at that point was some evidence of a want of reasonable and probable cause, which required that the case should be submitted to the consideration of the jury; and a verdict for small damages should be supported as warranted by the unjustifiable prosecution after the mistake had been discovered.

*Held*, also, that the prosecution had terminated in favour of the accused by the withdrawal of the charge in open court by the Crown Attorney.

*Per* MAGEE, J.:—There was not, upon the undisputed facts, reasonable and probable cause even for the initiation of the prosecution; and the defendant, having instituted the criminal proceedings and made no effort to withdraw from them or stay them, there was evidence for the jury that he was taking part in the prosecution throughout.

Judgment of CLUTE, J., dismissing the action, after a verdict of the jury in favour of the plaintiff, reversed.

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing the action.

The plaintiff, an expressman, plying his trade in the city of Toronto, was arrested, at the instance of the defendant, on a charge of obtaining a roll of sole leather by false pretences, but was released on bail, and the charge against him was subsequently withdrawn. The plaintiff was employed to carry the goods by the real thief, who, by an ingenious scheme, obtained possession of the roll of leather from a firm of dealers of which the defendant was a member, and sold it to one Brodie. The plaintiff was in reality an innocent instrument in the hands of the true offender, who was subsequently arrested and con-

victed. The defendant, being sued for the arrest and prosecution of the plaintiff, pleaded that he had reasonable and probable cause.

At the close of the plaintiff's evidence at the trial, before CLUTE, J., and a jury, at Toronto, the defendant moved for a nonsuit, and renewed the motion at the close of the whole evidence. The trial Judge allowed the case to go to the jury, reserving judgment on the motion for a nonsuit. The jury found a verdict for the plaintiff with \$200 damages. The Judge, however, after the jury's finding, granted the nonsuit, holding that, upon the undisputed facts, the defendant had reasonable and probable cause for doing as he did.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 26th April, 1909.

A. J. Russell Snow, K.C., for the plaintiff. No questions were left to the jury, but in the charge the learned Judge, in effect, put the same questions to the jury as are indicated in Stephen on Malicious Prosecution, p. 71, and in *Abrath v. North Eastern R.W. Co.* (1883-6), 11 Q.B.D. 440, 11 App. Cas. 247, and the jury found for the plaintiff. The Judge dismissed the action, finding, as he said, reasonable and probable cause on the undisputed facts. The whole facts were submitted to the jury. [Counsel stated the facts.] The facts in relation to reasonable and probable cause were in dispute, and could not be withdrawn from the jury: *Hamilton v. Cousineau* (1892), 19 A.R. 203.

[BOYD, C.:—We must call on counsel for the defendant. There is evidence that the charge was prosecuted after the defendant had information as to the real facts.]

H. H. Dewart, K.C., for the defendant. Upon the real facts there is no dispute; the defendant certainly did not act without reasonable and probable cause when he laid the information; and the question of reasonable and probable cause must be determined as of that date. *Still v. Hastings* (1907), 13 O.L.R. 322, 14 O.L.R. 638, is distinguishable on the facts. I refer to *Davis v. Hardy* (1827), 6 B. & C. 225; *Hétu v. Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128. A withdrawal of a charge is not equivalent to an acquittal; a favourable termination of the proceedings is not shewn. I refer to *Thomason v. Demotte* (1859),

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9 Abbott Pr. (N.Y.) 242; *Baxter v. Gordon Ironsides and Fares Co.* (1907), 13 O.L.R. 598. *Beemer v. Beemer* (1904), 9 O.L.R. 69, is a recent case on the point, but does not cover this case.

*Snow*, in reply, referred to *Carruthers v. Beisiegel* (1908), 1 Alta. L.R. 390, and *Shrosbery v. Osmaston* (1877), 37 L.T.N.S. 792, as to reasonable and probable cause; and to Stephen on Malicious Prosecution, p. 103, as to favourable termination.

June 14. *Boyd, C.*:—Apart from the aspect of the case fully discussed by my brother Magee, the evidence shews that there was an absence of reasonable and probable cause in not withdrawing from the prosecution at an early stage. Though a private prosecutor may have such knowledge as would warrant the commencement of criminal proceedings, he is not relieved from the primary duty of acting discreetly and fairly towards the accused person in directing and continuing the prosecution. Though reasonable and probable cause may exist at the initiation, yet, if it afterwards appears that there is good reason to doubt whether the charge is well founded, the private prosecutor should make reasonable inquiry to clear the doubt, and, if he has obvious means of finding out that the charge is not well founded, he should relinquish the matter or do what he can to dis sever himself from its further prosecution.

As said by Bramwell, B., in *Fitzjohn v. Mackinder* (1861), 9 C.B.N.S. 505, 522: "Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it,—then, why should it not be maintainable for those parts, even when it is not for the mere preferring of the bill?" And in the same case Cockburn, C.J., says: "In my opinion . . . a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a judge or magistrate, or, if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused:" p. 531. The passages I have cited are also cited

with approval in the Privy Council in an Indian appeal: *Gaya Parshad Tewari v. Bhagat Singh* (1908), L.R. 35 Ind. App. 189. And see *Musgrove v. Newell* (1836), 1 M. & W. 582, 589.

As I read the evidence in this case, the conclusion to which Brodie and Heaven came, after going over all the events of the transaction, was that the one man who had committed the fraud and had sold the leather, so fraudulently acquired, was Fancourt. There was but one man mentioned by Heaven to the police department in taking the initial step of issuing a warrant, and when the man was arrested thereon and brought up next day for identification in presence of Heaven and Brodie, Brodie declared he was not the man who had sold the leather. The only excuse now given by Heaven for not then interfering and letting the police know there was some mistake, was that he did not consider it was his duty to stop further proceedings, and that the matter was in the hands of the police. But the officer Verney, who is said to have advised him to proceed, says he left it to Heaven's own discretion. His non-intervention at that point seems to me to be some evidence of a want of reasonable and probable cause, which would require that the case should be submitted to the consideration of the jury. They have not given large damages, and on this head of unjustifiable prosecution of the case after the mistake had been discovered, the amount may well be supported.

I agree with the learned trial Judge that the prosecution has terminated in favour of the accused by the withdrawal of the charge in open court by the Crown Attorney: *Baxter v. Gordon Ironsides and Fares Co.*, 13 O.L.R. 598, 601, and cases there cited.

Judgment is to be entered on the verdict for \$200, with costs of action and appeal.

LATCHFORD, J.:—I agree.

MAGEE, J.:—In this case the plaintiff, a licensed public carter in Toronto, living at the suburb Todmorden, was innocently made instrumental in a fraud perpetrated by one Baker upon the defendant's firm, Smith Baggs & Heaven, wholesale leather dealers, and upon another firm, Parsons & Son, in the like business. While on the public carters' stand, he was employed, on the 20th May, by Baker, then wholly unknown to him, and who did

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not give any name, but said he was, and appeared to be, a commercial traveller, to go to the two firms and deliver to them letters which Baker handed to him in sealed envelopes, and to get some leather, which Baker said he had bought at a bargain and to be removed that day, and to ask for the invoices for the leather. Baker also asked him to keep the leather for him over night, under pretence that the persons to whom he was going to sell it were not ready to receive it—one of them being, he said, one Brodie of 567 Dundas street, who was unknown to the plaintiff. The plaintiff went with his express waggon and delivered the envelopes, not knowing their contents, and received the leather and also invoices—in sealed envelopes—having no knowledge whether they were receipted or not. The envelope containing the defendant's invoice for \$60.42, the plaintiff saw, was addressed to Brodie, and gave his street and number. It does not appear whether the other was addressed at all. The plaintiff did not notice if it was. The envelopes delivered by the plaintiff to the wholesale firms contained forged orders, purporting to come from Brodie, asking that leather be sent him at once by bearer, as the writer was out of stock. While waiting for the defendant's leather, the plaintiff stated to the defendant that he was going to Parsons & Son also, and while he was at the latter firm's warehouse it was noticed that he had on his waggon leather from Smith Baggs & Heaven. To the defendant, when it was suggested that, instead of waiting for the leather, he might call on his way back from Parsons & Son's, he stated that he would not be coming back that way that night, although it seems that would be on his way from Parsons & Son's to Brodie's, and it was then about five o'clock. The defendant, or his clerk, wrote out a receipt for the leather, which the plaintiff signed with his own name, "E. Fancourt," and the defendant put down the word "express." The receipt was written on the forged order, but the defendant himself does not think the plaintiff read the order, and the latter says he did not. Throughout he was making no secret of his identity, his movements, or his doings. His signature did not appear at all like the writing in the forged orders.

On the following day Baker came to him and got the invoices and arranged to go to Brodie's on the next day, as it was then raining. On the 22nd May the plaintiff took the leather in his

express waggon to Brodie's, under the directions of Baker, who accompanied him—a friend of the plaintiff being also on the waggon—and the plaintiff assisted to carry the leather into Brodie's shop, but knew nothing of the dealings with Brodie inside the shop by Baker, who there and then sold it to Brodie, and received \$40 for it. Baker was unknown to Brodie also, but had called on the latter a week previously and said he would bring some leather for sale. Brodie took a receipt for the \$40, which Baker signed in the name of Jackson. After leaving Brodie's, Baker paid the plaintiff for his services, including the delivery of Parsons & Son's leather, which, however, Baker said, might be on hand for two or three days, as he expected a man in Yonge street to buy it, but was not sure. What became of that package afterwards does not clearly appear. The plaintiff had left it with a friend in the city, who, it is said, subsequently delivered it, but whether to a purchaser under Baker's instructions or to Parsons & Son is not stated.

Nothing more was heard of the matter by the defendant till the 27th May, when, having learned from Parsons & Son that Brodie had not received their leather, the defendant, after being told by his clerk that the latter had noticed on the express waggon the name "Todmorden," went to see Brodie, and found his leather there, and was told by Brodie that he had not sent any orders, and that three men had come on the express waggon, and he had bought the defendant's leather from one of them, who had spoken to him about it the week before. The defendant, who had with him the forged order and the plaintiff's receipt thereon, asked to see the receipt for \$40, so as to compare the two, but Brodie could not find it, having mislaid it. The defendant says he did not ask Brodie what name was signed to it, nor did he ask or learn from Brodie the description of any of the men. He asked about the rig, and they concluded, as was the fact, that it was the same rig which was at the defendant's and at Brodie's. The defendant says that Brodie told him he saw a payment of money between the men, but Brodie denies having seen it or having so stated. He says he saw apparently some business transaction between the men outside his shop, but even that he says he did not tell the defendant before the latter laid the information.

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From Brodie's the defendant went to Parsons & Son's, and was there satisfied that the same express waggon had been there, and he learned what has already been mentioned as having occurred there, and he was asked by Parsons, in any steps which he took, to act also for them.

The defendant also looked up the directory, and there found in Todmorden the name "Edwin Fancourt," with its address, as that of a tinner, but he did not find the name there as an expressman, so he made no further inquiry in that quarter. It was, in fact, the plaintiff's name and address which were so entered. The defendant made no attempt to find whether there was a licensed carter of the plaintiff's name.

From Parsons & Son's the defendant went to the police office, and there saw a sergeant of detectives, and he says he told him the facts and that two men had sold to Brodie and divided the money, and was advised by him to lay an information against Fancourt, and then the police would take the matter up. He at once laid information, and therein asked for a warrant to arrest.

The sergeant, however, who was called as a witness for the defence, says his recollection was that the defendant did not tell him of more than one man being at Brodie's with the leather or being in the case at all, nor of Fancourt being an expressman nor of Todmorden, and he says it was later in the case that he learned of the defendant having looked up the directory and found the name in Todmorden, and, further, the sergeant says, he left it to the defendant's own discretion whether to swear out a warrant or not. Although no residence of E. Fancourt was stated in the information, the warrant issued was for the arrest of E. Fancourt of the city of Toronto.

On the following morning, the 28th May, the plaintiff was at his usual stand and was arrested and taken to the police station. While there the defendant and Brodie were telephoned for and came there, and Brodie at once said, in the presence and hearing of the defendant, that the plaintiff was not the man who had sold him the leather. Notwithstanding that, the plaintiff was kept in custody over night, and next day, the 29th May, was brought before the police magistrate and admitted to bail on his own recognizance till the 5th June, and on that date till the 12th June.

While so on bail, the plaintiff, on the 9th June, in the street, caught sight of Baker and had him arrested. Information was laid by a police officer against him, and he was remanded till the 16th, on which date Brodie and the defendant and plaintiff were sworn as witnesses against him, and he was remanded till the 23rd, when, after some additional evidence, he was convicted of obtaining the leather by false pretences and on several other charges.

The plaintiff appeared before the police magistrate on the 19th June, pursuant to his recognizance, and the charge against him was then withdrawn, as is sworn by the clerk of the police court, who also produces the information, with the word "withdrawn" indorsed thereon. The plaintiff says the charge against him was withdrawn when he gave his evidence on the 16th June against Baker.

Detective Murray says that Mr. Corley, who is County Crown Attorney, withdrew the charge, and so stated in open court.

The defendant is not shewn to have done anything towards it or to have modified his course towards the plaintiff in any way, and says that he did not ask for the plaintiff's release; he considered it was then in the hands of the police authorities.

On the evidence the jury might well find that the defendant had every reason to believe that the man who came for the leather was either a public carter or assuming to be one. He had signed what purported to be his name, and he had truly and openly spoken of his movements. That being so, it would seem that the most obvious consideration would be, was he really what he assumed? That could readily have been ascertained by inquiry at the city licensing office, but no attempt was made. A man of the same name and apparent residence was found in the directory, but no attempt was made to learn whether it was the same person or not. Inquiry in either direction would have resulted in disclosure that the bearer of the name had been acting in the course of his ordinary employment, and, whether concerned in a fraud or not, was at least making no concealment of his identity or endeavouring to cover up his actions. The extreme unlikelihood that a man having a public license, and so easily traced, would so openly and confessedly act dishonestly, would, of itself, to an ordinary mind, call for inquiry before coming

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to a conclusion of guilt. The defendant had no reason whatever, the jury might well have found, to suppose that a carter, whose ordinary business it is to act as carrier for others, knew anything of the contents of the sealed envelopes delivered by or to him. So far as the defendant learned from Brodie, there was nothing to shew that the expressman who took the goods there was the person who sold them. The fact of there being one or two other persons there made it obvious that it was possible the expressman was still only acting as expressman, and until that possibility was displaced there was no right to come to the conclusion of his participation in the fraud.

The facts with regard to Parsons & Son's leather, although *res inter alios acta*, would be proper to be given in evidence on a prosecution against the plaintiff, with a view to shewing knowledge and intent by him, and therefore would be proper for the defendant to take into consideration. But it does not anywhere appear that either the leather or the invoice from Parsons & Son was addressed to Brodie or to any one, or that the defendant was told so, or that there was anything to shew that the carter knew anything more than a telegraph or messenger boy of the contents of the envelopes delivered by or to him or the destination of the goods, or that there must necessarily have been a conscious failure of duty on his part.

It is otherwise with regard to the leather and invoice from the defendant's own firm. The plaintiff himself says that he got the envelope addressed to J. Brodie, 567 Dundas street, and he supposed it to contain the invoice, and he had no doubt in his own mind that it was his duty to deliver to Brodie, and he would have used that judgment, and it would not have gone to any one else, and, also, he never supposed that Baker was Brodie.

The defendant might reasonably take the same view. He knew that the invoice was plainly addressed to Brodie, and he might well think that it was the duty of the carter to give both it and the leather to Brodie. He knew from Brodie that, as to the invoice, for which the plaintiff had asked specially, that duty had not been performed at all. Any suggestion that the carter might have been deceived and led to suppose some one else was Brodie would be removed from the defendant's mind by the fact

not only of the specific address, but that the carter had actually taken the leather to Brodie, and yet apparently withheld the invoice and thus aided the fraud. For some reason, also, which would be unknown to the defendant, the carter, contrary to his usual duty, had not even taken the leather to Brodie till the second day. These are, undoubtedly, important facts in the defendant's favour. But, coupled as they are with the knowledge by the defendant of the difference in the handwritings and of the presence of another party in the transaction, who might well have been, as he was, the sole gainer, and with the great improbability that a licensed carter and householder, such as he could easily have ascertained the plaintiff to be, would so openly have made evidence against himself if acting fraudulently, I cannot think that they dispensed with the necessity of due and careful inquiry before setting the criminal law in motion, or that they could be said to furnish reasonable and probable cause therefor.

It would be, indeed, unfortunate if men whose occupation involves frequent employment by strangers, and who are subject to regulation and license, should be liable to arrest, without due inquiry into the facts, because they have acted, in the course of that employment, under the direction of others. It would be most unreasonable that they should be subject to arrest without a word of inquiry or opportunity for explanation. Had this plaintiff been spoken to on the subject, he could at once have explained his connection with the matter. The defendant had no justification for supposing that he would attempt to escape. He says that he did not inquire from the plaintiff because he thought, if he did, the police would say it was the worst thing he could do, and he wanted to put the whole thing in the hands of the proper authorities at once. But, according to the evidence of the detective sergeant, he did not state to him the whole material facts, and, according to Brodie's evidence, what he did state was not correct.

The learned trial Judge based his judgment of nonsuit upon conclusions as to several matters of fact in which a different finding might well be arrived at by the jury. One was that Brodie, having seen the two men together, as if in a business transaction, the impression made upon Brodie's mind was conveyed to the defendant, but Brodie says that he does not think that he so told the defendant, and the defendant did not tell the detective that,

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but told a different story, and the jury might well conclude that it was not told him. Another assumed fact was that the defendant did not know that the plaintiff was an expressman, but the jury might well have found that he did, and so spoke of him, and had no reason to suppose he was not. Again, the learned Judge says: "Nine out of ten reasonable men, acting with discretion, would have done precisely as this defendant did by laying the matter before the police authorities and following their direction; that is what he did, that is all that he did." But the evidence of Brodie and of the detective sergeant would go to shew that he told the latter less and more than the material facts known or told to him, and that he was not following the direction of the detective sergeant, even if that could have been a protection to him, but was left to act upon his own discretion. Having in view that these facts, which the learned Judge considers material, are clearly matters of controversy for a jury to settle, I do not doubt that, had he not considered them to be uncontroverted, he might not have come to the conclusion he did.

The necessity for a prosecutor to take reasonable care to inform himself of facts with which he might have made himself acquainted was dealt with in *Abrath v. North Eastern R.W. Co.*, 11 Q.B.D. 440, affirmed 11 App. Cas. 247, and in *McGill v. Walton* (1888), 15 O.R. 389. And I may refer to *Hamilton v. Cousineau*, 19 A.R. 203, and *Still v. Hastings*, 13 O.L.R. 322, affirmed 14 O.L.R. 638, as to the right to withdraw the case from the jury.

The defendant having instituted the criminal proceedings and made no effort to withdraw from them or stay them, or correct his misstatements to the police authorities, there was evidence for the jury that he was taking part in the prosecution throughout.

In support of the nonsuit it was urged here that the plaintiff had not shewn that the criminal proceedings had terminated in his favour. That objection was not given effect to by the learned trial Judge, and was dealt with in the case of *Beemer v. Beemer*, 9 O.L.R. 69, and *Baxter v. Gordon Ironsides and Fares Co.*, 13 O.L.R. 598; and see 26 Cyc. 58.

Upon the evidence I think that the nonsuit should not have been granted, but that the verdict of the jury should be given effect to, and judgment entered for the plaintiff for the amount, with costs.

E. B. B.

## [DIVISIONAL COURT.]

## BRADLEY V. McCLURE.

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*Landlord and Tenant—Land Let “for Pasturing Purposes”—Hay Raised by Tenant—Injunction against Selling—“Grazing” and “Pasturing” Distinguished—Breach of Contract—Damages to Land.*

The defendant agreed to rent a farm from the plaintiff “for pasturing purposes,” by a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes, the defendant raised a crop of hay on part of the land, which he cut and stored in his barn and endeavoured to sell:—

*Held*, that the defendant was rightly enjoined from selling and removing from the farm any part of the hay, but that his raising a crop of hay on the farm was not a breach of his contract to use it for “pasturing purposes,” as these words did not require that the grass should be severed only by the teeth of the feeding beasts, but permitted him to cut the hay and remove it to his barn, and either use it in feeding his cattle during the winter or leave it on the premises after the termination of the lease.

*Westropp v. Elligott* (1884), 9 App. Cas. 815, discussed and followed.

Judgment of ANGLIN, J., at the trial, as to damages for breach of contract, reversed, but otherwise affirmed.

ACTION for a declaration, damages, an injunction, and an account in respect of a lease of a farm for pasturing purposes, and to recover \$216 and interest upon a promissory note given for rent under said lease. The facts are fully set forth in the judgment.

The action was tried at Sarnia on the 8th April, 1908, before ANGLIN, J., with a jury.

*I. Greenizen* and *R. McKay*, for the plaintiff.

*J. W. Hanna* and *F. W. Wilson*, for the defendant.

May 29, 1908. ANGLIN, J.:—The plaintiff leased to the defendant a farm in the township of Brooke, upon an arrangement of which the parties made the following memorandum:—

“We, the undersigned, agree to the following. Joseph McClure rents from W. J. Bradley lot 3 on the 9th concession Brooke for pasturing purposes, for the next two years, dated from to-day and agrees to pay therefor the sum of two hundred and fifty dollars per year payment to become due at the end of each year. Said McClure to keep all fences in repair at his own expense also any other repairs that he may require.

“Should Bradley have chance of selling property said McClure agrees to retire from property at any time on receiving four months’ notice and agrees to pay all rent due to time of leaving.

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"Any stock already on the property to remain for balance of present season, said Bradley to collect and retain all moneys for same.

"Witness:

(Sgd.) B. B. VanTuyl.

(Sgd.) Joseph McClure

(Sgd.) W. J. Bradley

per James Falconer jr."

The defendant, instead of using the entire farm for pasturage, raised upon 67½ acres of it a crop of hay. This crop the defendant cut and stored, and in the fall or early winter of 1907 he endeavoured to sell it. By order of the 14th January, 1908, he was enjoined from selling or disposing of this hay, which, upon the evidence, I find to have been then worth \$750. By order of the 27th January, 1908, the Court directed that the hay be sold with the privity of the solicitors for both parties, and that the proceeds of the sale be paid into Court. At the time of the trial this order had not been acted upon, though an appeal from it taken by the defendant had been dismissed on the 4th March.

In this action the plaintiff seeks judgment declaring the hay crop raised and cut by the defendant to be the plaintiff's property, and for delivery of the hay or payment of the proceeds of the sale to himself. The plaintiff also claims damages for the use of part of the lands for cropping instead of as pasturage, and an injunction against the use of any part of the lands for any purpose other than pasturage during the remainder of the term. The plaintiff further asks an account of a portion of the hay sold by the defendant prior to the 14th January, 1908, and judgment for the value thereof, and also for the amount of a promissory note for \$216 given by the defendant on the rent account.

The plaintiff's right to judgment upon the note was conceded at the trial.

I asked the jury to assess the plaintiff's damages upon the assumption that the defendant's use of the 67½ acres for raising a crop of hay was in breach of the terms of his contract, but that the crop nevertheless belonged to the defendant, with the right to dispose of it as he should please. They accordingly assessed these damages at \$135. I also asked them to assess any damages sustained by the defendant by reason of the injunction from the 14th January to the 27th January, upon the assumption that the plaintiff

was not entitled to this injunction. They found that the defendant had sustained no damage by reason of the injunction. All other questions I reserved for disposition by myself.

Upon the construction of the contract between the parties, in the light of the surrounding circumstances as disclosed by the evidence, so far as these may properly be considered, I find that the use of the 67½ acres for the purpose of raising a crop of hay was a breach of such contract. I find that the agreement of the parties was that beasts should be pastured on the entire lot so far as cleared, that is, that the growing grass should be severed by the teeth of the feeding beasts and not otherwise (except, perhaps, enough to provide for wintering the beasts), and that the land should be used for no other purpose during the two years' term. I find that the defendant did not intend to feed the hay cut by him to beasts kept upon the farm, but, on the contrary, intended to sell, and in fact endeavoured to sell, all of it that was saleable.

The memorandum defines the purpose for which the defendant took the farm, and where the purpose is thus expressed "the lessee cannot use the thing for any other purpose than that which is expressed in the letting." Pothier, approved by Lord Blackburn in *Westropp v. Elligott* (1884), 9 App. Cas. 815, at pp. 827-8. The affirmative words, "for pasturing purposes," involve a negative provision that the land shall not be used for other and inconsistent purposes. "A Court of equity, although it cannot enforce affirmatively the performance of a covenant, may, in special cases, interpose to prevent that being done which would be a departure from, and a violation of, the covenant:" *Doherty v. Allman* (1878), 3 App. Cas. 709, 731, 720, 729. Here the breach of the covenant of the lessee has unquestionably done injury to the land and caused substantial damage. The future damages which it will occasion, if persisted in, cannot be disposed of in the present action; at least one further action will be necessary. If a supply of manure cannot be procured to restore the fertility of the land, the damage may be uncertain and difficult of ascertainment. I regard the case as one in which a Court of equity, in the exercise of its discretion—if the case be one for discretion—may well interfere by injunction to prevent a fraudulent breach of agreement by the defendant. Indeed, the authorities, in my opinion, warrant the view that this agreement should be treated as the equivalent of an express under-

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taking by the defendant not to use the land for the purpose for which he has used it, and for which he claims the right to continue to use it: *Rolls v. Miller* (1884), 27 Ch.D. 71, 84. In that view, to paraphrase Lord Blackburn's language in *Doherty v. Allman*, "the answer would be plain whether the damages were great or little; the very bargain on which the premises were taken was that the tenant should not use them for cropping purposes, and therefore he should, of course, be prevented from doing so." The plaintiff's right to an injunction to prevent future breaches of the defendant's negative agreement with him is, in my opinion, well established, as is also his right to recover damages for past breaches thereof, if he should not be held entitled to other and greater relief.

His claim to ownership of the hay stands upon a different footing, and, if his right to the hay should be affirmed, the question of his right to both the hay and the damages found by the jury must be further considered.

The damages being assessed at \$135 and the hay crop valued at \$750, if the plaintiff's right should be restricted to the recovery of damages and the tenant should be held to own and to have a disposable interest in the hay, it is obvious that the breach of his agreement would prove highly profitable to the latter.

Had the tenant merely agreed to feed to beasts on the farm all hay raised on the land, and to remove no part of it from the premises, while the property in the hay would have been his, he would not have enjoyed in regard to it a full and unrestricted *jus disponendi*: *Snetzinger v. Leitch* (1900), 32 O.R. 440. His creditors would not be allowed to take the hay under execution. Moreover, a covenant to use all the hay on the land touches and concerns the land so closely that it must be deemed to run with the land: *Chapman v. Smith*, [1907] 2 Ch. 97; and the tenant, if about to remove the hay in breach of such a covenant, will be restrained from so doing by injunction: *Snetzinger v. Leitch*, 32 O.R., at pp. 444-5, and cases there cited.

In the case to which I have just referred the tenant had the right to sever the hay, etc.; hence the view expressed that the property in the hay was his. But under the agreement in the present case the tenant had no right to cut the hay; he could only do so in breach of his contract. Though in the memorandum of lease we find the words, "Joseph McClure rents lot 3," etc.,

reading these words in conjunction with the words, "for pasturing purposes," makes it reasonably clear that McClure was merely to have the right to occupy the lands with his beasts and to graze them upon it. The raising of a crop of hay was in breach of his agreement; his cutting of that crop was wrongful, and the plaintiff contends that by that tortious act the defendant did not acquire title to the hay so severed. On the other hand, for the defendant it is urged that he is not a mere licensee, but a tenant of the land; that as tenant he is entitled to the crop raised on the land, though grown in breach of contract; that as the landlord could not have taken the growing crop because the tenant failed to pasture his beasts upon it, neither can he claim it as his after severance; and that his only remedy for past breaches of contract is in damages.

If the defendant were a mere licensee, or even a licensee entitled to a profit *à prendre* (*McIntosh v. Leckie* (1906), 13 O.L.R. 54), the plaintiff's title to the severed hay would, I think, be clear. But, upon my construction of the agreement between the parties, their relationship is that of landlord and tenant, not merely because the word "rents" is used in the memorandum (*Taylor v. Caldwell* (1863), 3 B. & S. 826, 832), but because the effect of the whole agreement is to give the defendant "an exclusive right of occupation of the land though subject to . . . a restriction of the purposes for which it may be used." This is in law a demise of the land itself: *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, 408; *Lynch v. Seymour* (1888), 15 S.C.R. 341.

If the tenant of a house, which he had leased for use only as a private dwelling, should convert the building into a shop and thus make out of it a large return, he would not be accountable to the landlord for the moneys so acquired. The latter, in addition to an injunction to restrain any future or continued breach of the tenant's contract, would be entitled merely to such damages as would compensate him for any injury to the reversion which he could prove. Again, if, in breach of a contract not to till meadowland, a tenant should sow wheat or plant vegetables, the landlord could not, I think, claim the crop either before or after it had been reaped. So here, though the tenant's acts in growing and cutting the hay were undoubtedly illegal, and in breach of his contract, it does not follow that the landlord therefore owns the severed crop. The property in this crop is, in my view, that of the tenant, and if it

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had been sold I should probably have been obliged to affirm his right to the proceeds of such sale.

On the other hand, the agreement to use the land for pasturage implies that no hay shall be sold or removed from the land—that the grass grown on the land shall not be used otherwise than for the feeding of beasts upon the land, which should benefit by the manure thus produced. The sale or removal of the severed hay by the defendant would be further acts in breach, if not of the letter, certainly of the spirit of his agreement. It is true that consumption as fodder by beasts fed in barns or stables, or consumption otherwise than by beasts actually grazing in the fields, was not contemplated by the parties; it is also true that, though the hay be consumed as fodder by beasts upon the premises, it is not feasible to compel the tenant to place or spread the manure thus produced upon the fields: *Phipps v. Jackson* (1887), 56 L.J. Ch. 550; yet, with a view to having the spirit of the agreement of the parties carried out as nearly as is now possible and as far as the past misconduct of the defendant has not rendered it impossible to effectuate their intent, the Court may, and I think should, if the plaintiff so desires, enjoin the defendant from selling this hay, from removing it from the plaintiff's farm, from using it for any other purpose than to feed it to beasts upon the farm, and from removing from the property any of the manure which may be thus produced. If the plaintiff elects to take this injunction, his damages as assessed by the jury must be reduced. He will, in that event, have the benefit of the hay in the form of manure, should the defendant feed it during the balance of his term, or, should the defendant fail so to use it, as hay which he can himself feed to beasts and thus obtain manure. He will, of course, not have the advantage of having the manure spread or distributed over the farm unless the tenant should voluntarily do this. If he takes the injunction forbidding the sale or removal of the hay, his damages should be reduced from \$135 to \$75.

The plaintiff will elect within ten days whether he will take judgment for the \$135 damages awarded by the jury, allowing the defendant, in that event, to deal with the stored hay as he may wish, or an injunction in respect to the hay and \$75 in lieu of the damages assessed by the jury (including damages for the removal and sale of the 2½ tons of hay disposed of by the defendant before the 14th January, which I assess at \$10), thus

preventing the defendant from reaping advantage from his dishonest breach of contract.

The plaintiff will therefore have judgment for \$216, the amount of the promissory note, with interest at five per cent. from the 8th June, 1907; an injunction restraining the defendant from using the plaintiff's farm otherwise than for grazing purposes during the remainder of his term as tenant; also, at his election, either for \$135 damages assessed by the jury, or for an injunction restraining the defendant, if the hay be still unsold, from selling or removing the same from the plaintiff's farm, from using it otherwise than to feed it to beasts upon the premises, and from removing from the farm any part of the manure which may be so produced, and for \$75 damages; and for payment by the defendant of the plaintiff's costs of this action upon the High Court scale.

From this judgment the defendant appealed to the Divisional Court, and the appeal was heard before BOYD, C., MAGEE and RIDDELL, JJ., on the 25th September, 1908.

*F. W. Wilson*, for the appellant.

*R. McKay*, for the respondent.

The arguments and cases relied on sufficiently appear in the judgments.

September 28, 1908. BOYD, C.:—The defendant rented from the plaintiff a farm of 200 acres for two years from November, 1906. About 117 acres was cleared and had been seeded down about eight years before; the rest was brush and swamp land. The only stipulation as to the use of the place is contained in the words "for pasturing purposes." The defendant, as he says, pastured stock (sheep and cattle) over the whole place the first winter and all the fall, and in the next spring he fenced off about 67 acres, which he let grow to hay, and allowed the cattle to feed on the rest of the farm. On taking the lease he bought 40 tons of hay from the plaintiff which he fed out on the place (I assume during the first winter). On the hay part of the land he began to cut in July and finished in August, storing it in the barn, expecting to winter his stock with part of the produce, and meaning to sell part.

He was rightly enjoined from selling and letting be removed from the place any part of the hay. That relief is quite justified by the apposite case of *Crosse v. Duckers* (1873), 27 L.T.N.S. 816.

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But his right to damages for injury to the land in respect of the grass being allowed to go to hay, and then being cut and removed to the barn, depends upon the correct construction of the words in the lease "for pasturing purposes." It was clearly contemplated that the stock should winter and be fed on the place: there was more than mere agistment, *i.e.*, browsing or grazing over the place. "For pasturing purposes" has, I think, a larger meaning than "for grazing purposes." In etymological view, grazing is connected with grass and pasturing with feeding. Grass and hay are names applied to the same product in different stages of growth and treatment: both are suitable for the fodder of cattle. Grass may be cut when green for the immediate food of cattle in stall, or it may be cut and stored when dry and seasoned for their winter use. In either case the use would be for pasturing purposes on the farm rented. The hay in this case came to be such of its own growth, because it was not grazed down by the cattle: it was apparently a coarse crop of third-class hay, made up of a mixture of timothy, alsike, and weeds. I see no reason why parts of it might not have been used for the litter as well as the fodder of the stock, so long as it was used on the farm.

In the Oxford Dictionary "pasture" is thus defined: (1) the action of feeding; (2) food, nourishment, sustenance; (3) the growing grass or herbage eaten by cattle. Now, herbage is a term which may include both grass and hay. But the very words of this lease have received authoritative interpretation by the House of Lords in *Westropp v. Elligott* (1884), 9 App. Cas. 815. Lord Selborne says that "pasture means feeding cattle or other live stock on the land:" p. 819; that "consuming hay upon the farm is within the fair meaning of pasture:" p. 822. Lord Watson says: "The fact that hay or green crop is raised in the holding for the exclusive purpose of maintaining the grazing stock during autumn or winter will not deprive it of the character of a grazing farm:" p. 831. Lord Fitzgerald says: "For the purpose of pasture, in ordinary and popular speech, means for the feeding of cattle, whether it be for grazing or fattening or dairy purposes:" p. 838.

The tenant cannot be under supervision as to how he shall use the place for pasturing purposes—as to how much he shall feed as grass or how much keep for hay—he can, however, be

restrained from removing and selling any of the produce of the pasture, whether as grass or hay. The practical meaning of this lease is that all the herbage is to be used and consumed or left on the premises. It was conceded on the argument that if the lease, or the law as applied to the lease, allowed the tenant to turn the grass into hay and store it in the barn, there was no right to any damage on account of alleged deterioration of the soil by the removal of the crop from one place on the farm to another. This deterioration, if any, arose from the lawful use of the land demised—though the tenant might abstain from feeding all or any of the hay to his cattle afterwards.

The judgment cannot be supported as to the damages, and this part should be vacated; as to the injunction, it stands. No costs of appeal.

MAGEE and RIDDELL, JJ., concurred.

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[IN THE COURT OF APPEAL.]

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*Municipal Corporations—Drainage—Municipal Drainage Act, sec. 93—Claim for Payment for Construction Work—Forum—Action in High Court—Pleading—Summary Dismissal for Want of Jurisdiction—Drainage Referee.*

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Section 93 of the Municipal Drainage Act, as enacted by 1 Edw. VII. ch. 30, sec. 4, deals only with cases of damages occasioned to others by reason of the construction of drainage works in the way provided for by the municipality, and does not refer to the claim of a contractor or workman to be paid for work performed; and therefore an action brought in the High Court which appears by the statement of claim to be one to enforce payment of such a claim should not be summarily dismissed on the ground that the Drainage Referee alone has jurisdiction; but the question of jurisdiction should be left for determination at the trial, when the facts are investigated; MEREDITH, J.A., dissenting.

Whether the point of law raised is brought up for hearing and disposal under Rule 259 or Rule 373, the party raising it must admit, for the purposes of the argument, that the pleading on which it is alleged that the question arises is true in fact; and for the purposes of the argument the allegations of the statement of defence ought not to be regarded.

Judgments of FALCONBRIDGE, C.J.K.B., and a Divisional Court, reversed.

THIS was an application by the plaintiffs for a judgment or order dismissing the action, on the ground that the High Court

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had no jurisdiction to try the action, the same having been commenced by writ of summons and not in the manner prescribed by the Ontario Municipal Drainage Act and amendments thereto. The facts are stated in the judgments.

The application was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court at Ottawa, on the 25th January, 1908.

*C. H. Cline*, for the defendants.

*W. Greene*, for the plaintiffs.

January 31, 1908. FALCONBRIDGE, C.J.:—By 1 Edw. VII. ch. 30, sec. 4, a new section was substituted for sec. 93 of R.S.O. 1897, ch. 226. The defendants also cite 2 Edw. VII. ch. 32, sec. 4.

There seems to be no question but that the case in its general outline is governed by *Burke v. Township of Tilbury North* (1906), 13 O.L.R. 225; and I am informed that in a like case (*Barrett v. Cornwall*) my brother Teetzel at the hearing ruled that this Court had no jurisdiction. But the plaintiffs contend that the allegations made in paragraph 15 of the statement of claim take the case out of the statute and the Rule.

Paragraph 15 is as follows: "15. The plaintiffs further charge and the fact is that the defendant corporation, notwithstanding the said several assignments and notices thereof served upon them, have, contrary to the said assignments and notices thereof, paid to the said firm of J. & T. Gagnon a large sum of money, to which the plaintiffs were entitled under the said assignments, to wit, the sum of \$20,000 or thereabouts."

I am unable to see how paragraph 15 helps the plaintiffs. They have no higher rights than their assignors, the Gagnons, and the rights of the plaintiffs and of the Gagnons must be tried out in the proper forum. The defendants, the municipal corporation, if they have made these payments, have made them at their own peril, and, if it should appear, as the result of the proceedings before the Referee, that moneys were improperly paid in defiance of due notice, then that is something for which they may have to answer. But the claim of the Gagnons then and now must be investigated and determined in the tribunal which the Legislature has appointed for the purpose.

In my opinion, the action must be dismissed with costs.

The plaintiffs appealed from the judgment of FALCONBRIDGE, C.J., and their appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., TEETZEL and CLUTE, JJ., on the 26th February, 1908.

*W. E. Middleton*, K.C., for the plaintiffs.

*C. H. Cline*, for the defendants.

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April 24, 1908. The judgment of the Court was delivered by CLUTE, J.:—Motion by way of appeal from the order of the Chief Justice of the King's Bench, pronounced herein on the 31st January, 1908, dismissing the plaintiffs' action, upon the ground that the plaintiffs were bound to proceed in respect of their claim before the Drainage Referee.

The plaintiffs claim, as assignees of J. & T. Gagnon, all moneys due them from the corporation of the township of Roxborough, for certain drainage construction known as "the La-londe drain."

The defendants set up in their statement of defence that the plaintiffs' claim is in respect of a claim and dispute arising between a company or individuals and the municipal corporation in connection with the construction, improvement, or maintenance of drainage works carried on under and in pursuance of the Municipal Drainage Act, and that this Court has no jurisdiction to try this action, the same having been commenced by writ of summons, and the defendants claim the benefit of the Municipal Drainage Act.

The affidavit of the plaintiffs' solicitor states, from information received from the treasurer of the township, that there is no claim which the said J. & T. Gagnon ever had against the said township which can be assigned to the plaintiffs, except claims in connection with the drainage works, and that the whole of the plaintiffs' claim herein is based upon said claims under the contracts set out in the statement of defence of the township of Roxborough in connection with the drainage schemes, which were entered into by the township under the provisions of the Ontario Municipal Drainage Act.

The manager of the Bank of Ottawa, in reply to this paragraph, states that the said paragraph is not correct or wholly correct, but, on the contrary, the plaintiffs' claim, or the most



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substantial claim in this action, is based upon paragraph 15 of the plaintiffs' statement of claim.

Paragraph 15 is as follows: "The plaintiffs further charge and the fact is that the defendant corporation, notwithstanding the said several assignments and notices thereof served upon them, have, contrary to said assignments and notices thereof, paid to the said firm of J. & T. Gagnon a large sum of money to which the plaintiffs were entitled under the said assignment, to wit, the sum of \$20,000 or thereabouts."

This statement does not, in my opinion, alter the status of the plaintiffs and defendants the corporation, in this action. It is not suggested that any part of this \$20,000 became due and owing otherwise than under the drainage contract and for drainage work. It is not suggested even that there ever was a stated account between the contractors and the municipal corporation. The plaintiffs can occupy no better position than the contractors. If moneys have been paid to the contractors after assignment and notice, that is a matter which the Referee can take cognizance of, having regard to the rights of all parties. Nor does it make any difference that the contractors have assigned for the benefit of creditors.

Section 93 of the Municipal Drainage Act, R.S.O. 1897, ch. 226, as amended by 1 Edw. VII. ch. 30, sec. 4, now reads: "(1) . . . Proceedings to determine claims and disputes arising between municipalities or between a company and a municipality or between individuals and a municipality, company or individual, in the construction, improvement or maintenance of any drainage work under the provisions of this Act, or consequent thereon, or by reason of negligence, or for a mandamus or an injunction, shall hereafter be made to and shall be heard or tried by the Referee only, who shall hear and determine the same and give his decision and his reasons therefor."

Sub-section 2 of sec. 93 provides that "proceeding for the determination of claims and disputes . . . shall hereafter be instituted by serving a notice claiming damages or compensation, or a mandamus or an injunction, as the case may be, upon the other party or parties concerned and the notice shall set forth the grounds of the claim."

Sub-section 3: "A copy of the notice with an affidavit of

service thereof shall be filed . . . and served within two years from the time the cause of complaint arose."

Sub-section 4 provides that "all applications under this section shall be made by notice of motion based upon affidavits filed," etc.

Sub-section 5, that "no application or proceeding within the meaning of this section shall be made or instituted otherwise than as therein provided."

Section 94 was repealed by sec. 5 of the amending Act, and in lieu thereof appeal is given to the Court of Appeal.

Section 95 provides that all damages and costs payable by a municipality and arising from proceedings taken under the Act shall be levied *pro ratâ* upon the lands and roads in any way assessed for the drainage work according to the assessment thereof for construction or maintenance, except as provided in subsecs. 2 and 3 of sec. 95.

Section 88 refers to the appointment of a Referee, who shall be deemed to be an officer of the High Court. Under sec. 89 he has all the powers of an Official Referee under the Judicature Act and the Arbitration Act. Under sub-sec. 2 of sec. 89, in respect of all proceedings before him, he shall have the power of a Judge of the High Court of Justice, including the production of books and papers, the amendment of notices of appeal, and of notices for compensation or damage, and of all other notices and proceedings.

The sole question, then, is whether the plaintiffs' claim for any balance which may be due the plaintiffs under their assignment from the contractors for work done in the construction of the drain is within the purview of the Act. The manifest intention of the Act is that the cost of the construction of the drain shall be paid for by a tax to be levied upon the lands to be benefited, and this must be so whether the construction is by day's work or under contract. If under contract, the claim, as between the municipality and the contractor, arises in respect of the construction of the drainage work, and such claim the statute provides shall hereafter be made to and shall be heard or tried by a Referee only, who, under sec. 95, shall levy the damages and costs *pro ratâ* upon the lands assessed for the drainage work, except in certain cases as therein provided, where he may direct

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that the whole or any part of such damage and cost shall be borne by such municipality and be payable out of the general funds thereof.

I do not see how it would be possible to carry out the intent and meaning of the Act if the claims for the construction of drainage works were permitted to be brought in the High Court, where a judgment might go against the municipality and be payable out of the general funds thereof. The Referee has the power under the Act to adjust all questions arising in respect of the claim. *Burke v. Township of Tilbury North*, 13 O.L.R. 225, although not like the present case, shews the broad application of sec. 93 of the Act.

During the argument the appellants stated that they did not press the application of the unconstitutionality of the Act, and this question was not argued before us, and is not therefore dealt with in this judgment.

I think the claim of the plaintiffs falls under sec. 93, and can be heard and tried by a Referee only. The appeal should be dismissed with costs.

From this judgment the plaintiffs appealed to the Court of Appeal, and their appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 28th September, 1908.

*W. E. Middleton*, K.C., and *W. Greene*, for the appellants. It has been held below that the action does not lie because the remedy is by proceedings before the Drainage Referee, and not by action. The bank sued the township corporation, Gagnon Bros., and their assignee for the benefit of creditors. The contract is alleged to have been completed. The whole question arises on the pleadings and on the construction of the Municipal Drainage Act, R.S.O. 1897, ch. 226, secs. 88 *et seq.*, and amendments. Section 88 deals with trial; sec. 89, with the powers of the Referee. The statutory limitation of one year is imposed by sec. 93, sub-sec. 3, which was amended by 1 Edw. VII. ch. 30, sec. 4, making it two years. Section 94 was repealed by sec. 5 of the amending Act, and a new section substituted. There is now no right in an action brought in the High Court to direct a reference to the Drainage Referee: *McClure v. Township of Brooke* (1902),

5 O.L.R. 59. Section 93, which is the one particularly relied on, does not interfere with the contractual rights of parties. The case said to be conclusive is *Burke v. Township of Tilbury North*, 13 O.L.R. 225; but that does not really throw any light on the controversy. I refer to *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C.B.N.S. 336, 356. The claim here exists apart from the statute, and that is where the line is drawn. If the statute should be construed as contended for by the defendants, it would be *ultra vires* of the Ontario Legislature; for the Judges must be appointed by the Dominion government. As I desire the statute to be construed, it is *intra vires*; but, if the other construction is correct, all the functions of a Judge are given to the Drainage Referee, appointed by the Ontario government, and that would be *ultra vires*. The Court will prefer the *intra vires* construction. See the opinion of Sir John Thompson as to the Quebec Magistrates' Courts, in *Hodgins on Dominion and Provincial Legislation*, p. 373 *et seq.* The defendants say in their statement of defence that the plaintiffs have been paid. The actual issues in the action are surely not such as come within the jurisdiction of the Referee. Much plainer words must be used in the statute to confer so wide a jurisdiction.

*C. H. Cline*, for the defendants. I wish to disabuse the mind of the Court of the idea that this action is of the nature indicated in the argument. The real question is as to the non-completion of the work under the contract. No contracting powers are given to the municipality. The whole of the work comes under the statute. I rely on sec. 93, sub-secs. 1 and 2. A claim of this kind comes under the very words used in these sub-sections. I rely on *Burke v. Township of Tilbury North*, 13 O.L.R. 225. As to the Statute of Limitations, if the plaintiffs would complete the work, they would be barred. The Court is bound by sec. 93, for the reasons given in the judgments below, and because of other provisions in the Act, *e.g.*, sec. 89, sub-sec. 2, and sec. 97. As to the constitutional point, no notice has been given under sec. 60 of the Judicature Act to the Attorney-General.

*Middleton*, in reply. The power of the Drainage Referee is the crux of the case. The jurisdiction cannot be enlarged.

May 5. Moss, C.J.O.:—It appears to me, with deference, that it was most unfortunate that the important questions which

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have been raised and discussed, and which involve such serious consequences, should have been brought up, dealt with, and disposed of in the form in which they have come before the Court.

The objection raised by the defendants is to the plaintiffs' right to maintain the action in the High Court of Justice, on the ground that it has no jurisdiction to entertain it—that the sole jurisdiction is vested in another tribunal created and established under the provisions of the Municipal Drainage Act.

It does not very clearly appear whether the point of law thus raised was brought up for hearing and disposal under Rule 259 or Rule 373. It is probable that it was intended to deal with it under the former Rule, and that it was by consent of the parties set down for hearing, though that is not shewn in the proceedings. But, as I understand the practice, no matter under which Rule it was brought on for hearing, the rule is the same, that, in considering the point of law raised, the party raising it must admit for the purposes of the argument that the pleading on which it is alleged the question arises is true in fact, just as under the old practice a party demurring was taken to admit the truth of the pleading demurred to. The objection taken in the statement of defence is really equivalent to a demurrer to the statement of claim: *per* Lord Esher, M.R., in *Salamon v. Warner*, [1891] 1 Q.B. 734, at p. 735. See also *per* Armour, C.J., in *Holender v. Ffoulkes* (1894), 26 O.R. 61, at p. 65.

The affidavit filed on behalf of the defendants is merely formal. It does not assume to traverse any of the allegations of fact set forth in the statement of claim, but merely expresses a belief, founded on information stated to have been received from others, that there is no claim except claims in connection with drainage contracts, and even that is called in question by the counter-affidavit filed on behalf of the plaintiffs.

For the purposes of the argument as to want of jurisdiction, the allegations of the statement of defence ought not to be regarded. Unless this were so, a defendant might support his point of law by putting upon record statements which were untrue in fact and which he would utterly fail to support by evidence at a trial. No doubt the parties might admit all the essential facts that could be proved on both sides and thus reduce the matter to a pure point of law, but that is not this case.

Looking, therefore, at the allegations of the statement of claim, which the plaintiffs undertake to prove, if permitted, and assuming, as for the purposes of the discussion of the point of law it should be, that they are true, I am unable to say at present that the High Court has not jurisdiction to entertain the action. The short substance of the 3rd to the 12th paragraphs, inclusive, is that, on or about certain specified times, certain persons therein named performed work or drainage construction for the defendants, and that in respect of such work large sums of money became due and payable to the said persons, and that the debts, accounts, and moneys due or owing to them by the defendants were duly transferred by the said persons to the plaintiffs, and that express notice in writing of such assignments were given to the defendants. Then follow some most material allegations, viz. :—

Paragraph 13. The said persons fully performed the said works or drainage construction, and all conditions have been fulfilled and all times elapsed whereby the said persons were entitled to be paid a large sum of money, to wit, the sum of \$35,000 or thereabouts.

Paragraph 14. The defendants, notwithstanding such assignments and notices thereof, have failed, neglected, and refused to pay the plaintiffs the said sum of \$35,000.

Paragraph 15. The defendants, notwithstanding the assignments and notices thereof, have, contrary to the said assignments and notices, paid to the said persons large sums of money to which the plaintiffs were entitled under the said assignments, to wit, the sum of \$20,000 or thereabouts.

The claim is for ascertainment of the amount due and owing and for payment thereof to the plaintiffs, and for a declaration that payments made after notice of the assignment are of no effect against the plaintiffs.

How can it be said that upon this statement of claim it manifestly appears that the High Court has no jurisdiction to entertain the action, and that it does so manifestly appear that the action should be summarily dismissed?

There is presented a plain, simple case of an indebtedness by the defendants assigned to the plaintiffs, the time for payment elapsed, but the defendants have not paid, and not only

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that, but, having in hand money payable to the plaintiffs by virtue of the assignments and notices, they have paid said moneys, to the amount of \$20,000, to their original creditors, the plaintiffs' assignors.

Why should such a case as is here presented be withdrawn from the High Court and relegated for adjudication to any other tribunal? The High Court is constantly engaged in dealing with claims similar in character. There is nothing to suggest the necessity of any investigation by the Drainage Referee. For all that appears, the defendants either have the necessary funds in hand or have provided for their payment by by-laws assessing the lands benefited by the works or drainage construction performed by the plaintiffs' assignors. It is shewn that they had in hand moneys out of which they paid the plaintiffs' assignors \$20,000 in respect of these works of drainage construction, which should have been paid to the plaintiffs.

At present this does not appear to be a case for the application of sec. 93 of the Municipal Drainage Act. That section deals only with cases of damages occasioned to others by reason of the construction of the drainage works in the way provided for by the municipality, and does not refer to the claims of contractors or workmen to be paid for work performed by them, which is the nature of the claim shewn by the plaintiffs in this case.

It is impossible to foretell what may develop when the facts are investigated at the trial, but it will then be for the trial Judge to deal with the case. In the meantime the plaintiffs are entitled to an opportunity of having their action tried in the forum which they have selected.

In my opinion, they should not have been deprived of that right upon a summary proceeding, and the case should have been allowed to proceed to trial in the ordinary way.

The appeal should be allowed, and there should be substituted for the order pronounced by Falconbridge, C.J., a declaration that the points of law should not now be determined, but should stand to be determined at the trial of the action. Costs throughout to the plaintiffs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—I agree, entirely, with the trial Judge and the Judges of the Divisional Court in their unanimous conclusions

in this case, and concur with them in the way in which such conclusions are reached; but desire to add some additional reasons which seem to me to make even plainer the necessity for the order dismissing the plaintiffs' action.

The dominant question is whether the plaintiffs' claim is one of those comprised in the 93rd section of the Municipal Drainage Act. If so, all else becomes plain sailing; for, under that section in its present form, all such claims must be prosecuted in the special manner provided for in the enactment, and cannot be enforced by ordinary legal proceedings.

The action is brought to enforce payment of part of the price of the construction of a drain originated and constructed, as far as it has been, entirely under the provisions of the Act before mentioned.

The plaintiffs are assignees of the contractors for the construction of the drain, but nothing material upon this question depends upon that.

The defence is, substantially, that the contractors have not completed the work and that there is now nothing due to them, or to the plaintiffs, in respect of it.

The issues between the parties, therefore, necessitate a long inquiry into the extent and character of the work done and of the accounts between the contractors and the defendants respecting the drain; and, if the plaintiffs should succeed, a probable readjustment of the burden which the persons and corporations whose lands are benefited by the drainage are to bear.

Such a claim seems to me to come, very plainly, within the words of the section, as well as within the purpose of the legislation, in excluding such claims from the ordinary course of litigation.

The section provides, among other things, that all claims arising between a company and a municipality in or consequent upon the construction of any drainage works under the provisions of the Act, shall be made to, and shall be tried by, the Referee only. I am unable to see any fair course by which the plaintiffs can escape from these very comprehensive and very plain words.

The purposes of the enactment, in this respect, were at least two-fold: (1) to relieve the ordinary machinery of the Courts from the clogging inconvenience and burden of the protracted

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trials of drainage cases, which were also a source of inconvenience, delay, and loss to ordinary litigants in the trial of their actions; and (2) to provide a simpler, more expeditious, and a better means of dealing with such questions, and with the many complications arising out of them. The advantage of a hearing before an officer specially qualified to deal with all drainage questions, who could conduct the reference at the convenience of those who were concerned in it at the most convenient place or places, and who could view the work if and whenever necessary or advisable, are obvious; and they are but a few of the intended benefits of the new system which the Act introduced.

It is to be remembered that the municipality is, in such cases, substantially but a trustee for the land owners for whose benefit the drain is constructed. That, generally, the substantial defendants in such a case as this are such land owners, for upon them generally the burden falls, a burden which must be, if it has not been already, apportioned among them according to their interests in the work, and one which becomes a charge upon their lands. It is not the simple case of making the ratepayers at large foot the bill; it would in most cases be manifestly unjust if it were.

The case, therefore, seems to me to be one plainly within the purposes of the Legislature in providing the special mode of procedure in question and in expressly excluding the ordinary methods of enforcing claims.

Under the Act as it was upon the last revision of the statutes, the ordinary methods of procedure were not prohibited in such a case as this, as they now are, but provision was expressly made for the Court in which such an action was brought or a Judge thereof transferring or referring it to the Referee; and the invariable practice was, and for some time before had been, to so refer all such cases: see *Sage v. Township of West Oxford* (1892), 22 O.R. 678.

The Act in that shape was not certain or satisfactory, but was made so, and at the same time quite logical, by the amendments of it made in the year 1901—1 Edw. VII. ch. 30(O.)—under which the section regarding the mode of procedure was made imperative; the section providing for a transfer from, or reference by, a Court was repealed; and the purposes of the enactment given full effect to and all doubtful questions eliminated.

No substantial injustice was done by the omission of any means of transferring an action improperly brought in any of the Courts to the Referee, for nothing would be gained by that, nothing lost by beginning before the Referee after being dismissed from the Court; no costs would be saved, for nothing done in Court would save any of the simpler matters of procedure before the Referee; the costs in the Court would in every case have been wholly wasted, whilst an excuse might be afforded for seeking the luxury of an action wholly unnecessary and which ought to be inexcusable.

But the chief incongruity in the Act, as it was, lay in the fact that it limited the time in which proceedings might be taken before a Referee, but made no limitation of the time within which an action might be brought; and so it may have been that when a claim was barred by lapse of time if made in the proper way, it might be yet enforced by merely adopting the expedient of bringing an action and having the action transferred or referred. That was very properly cured in the amendments of 1901, and at the same time the limitation was extended from one to two years. The propriety of such a limitation is obvious, having regard to the complicated interests concerned and to the fact that the lands benefited often change hands, so that a purchaser in good faith without notice might some day find his lands incumbered by a belated charge against which there was no reasonable means of guarding.

The Act as it now stands is, therefore, consistent, clear, and logical, as well as reasonable.

The question of jurisdiction has, I think, been very properly raised, by the parties, at an early stage in the action; because there can be no possible gain by the delay and expense of going down to trial of it. There has hitherto been no suggestion that that question cannot be as well considered now as at the trial; on the contrary, the case has been carried all the way up to this Court, with the concurrence of all parties, on the assumption that it could.

To say that the statement of claim only can be looked at, and its allegations alone taken into consideration, seems to me to involve a misconception of the nature of the case. The nature of the action must be the criterion; and its character is made very

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plain by the pleadings and the undisputable facts. The plaintiffs have no higher rights, under the contract, than their assignors had. They allege that the work is completed and that the price is due; that is denied: and the main contest turns upon that issue. To ignore the obvious facts will not aid any interests. If the action is vexatious, it ought not to be permitted to go further: Rule 261. Whether vexatious or not does not depend upon the statement of claim alone, but upon the whole circumstances, which may and ought to be proved upon the motion. But, if not vexatious, there is plainly a preliminary question of law involved, going to the root of the whole action, which question all interests require to be determined at as early a stage of the action as possible; and the facts material to that question may be made to appear "from the pleadings or otherwise:" Rule 373.

I would dismiss the appeal.

*Appeal allowed; MEREDITH, J.A., dissenting.*

E. B. B.

[DIVISIONAL COURT.]

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June 15.

RE MCGARRY.

*Will—Construction—General Bequest of Personality—"Goods and Chattels"—"Book Debts"—Intestacy as to Part of Realty—Absence of Direction as to Payment of Debts—Payment out of Personality.*

The testator bequeathed to his wife "all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate," etc.:

*Held*, that the testator's book debts were covered by the general words in the will "all goods and chattels whatsoever and wheresoever," and that there was no context which interfered with that construction.

Decision of CLUTE, J., affirmed.

The will dealt with certain lands and all the goods of the testator. The goods were given by general (not by specific or residuary) bequest to the widow, and nothing was said in the will as to payment of debts. The testator left some real property not mentioned or included in the will, and as to which he died intestate. As against the widow, it was contended that the debts should be paid out of the personality in exoneration of the lands descended:—

*Held*, that, notwithstanding the Devolution of Estates Act, secs. 4 and 9, the personal estate is still the primary fund for the payment of debts.

*Re Hopkins Estate* (1900), 32 O.R. 315, *Re Tatham* (1901), 2 O.L.R. 343, and *In re Moody Estate* (1906), 12 O.L.R. 10, approved.

And in this will no sufficient indication was to be found of the testator's intention to relieve the personality from the payment of the debts.

MOTION by the executors of James McGarry, deceased, under Con. Rule 938, for an order determining certain questions arising with regard to the estate of the deceased, upon the construction of his will. The facts appear in the judgments.

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The motion was heard by CLUTE, J., in the Weekly Court, on the 19th April, 1909.

W. M. German, K.C., for the executors.

F. W. Hill, for J. H. McGarry.

April 20. CLUTE, J.:—The testator, having bequeathed to his wife the family residence and all furniture therein contained, with certain exceptions, and certain other real estate, proceeds as follows:—

“I also will, devise, and bequeath unto my beloved wife all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate in the A.O.U.W.”

He then leaves a legacy of \$1,500 to his daughter, and gives to his son \$500 insurance and his medical works and instruments.

The question for decision is whether in the words “all goods and chattels whatsoever and wheresoever” there is a good bequest of the book accounts to the widow.

“The words *bona et catalla*, jointly or separately, in our ancient statutes and law writers, denote personal property of every kind, as distinguished from real (*Bullock v. Dodds* (1819), 2 B. & Ald. 258, 276):” Stroud’s Judicial Dictionary, 2nd ed., p. 823.

“A bequest of all testator’s ‘goods and chattels’ doth pass all his estate, active and passive (except land of inheritance and freehold estates and such things as depend thereon), as leases for years, gold, silver, plate, household stuff, cattle, corn, debts and the like (Touch. 447):” *ib.*

In a bequest of “furniture, goods, and chattels,” the latter words would pass only such things as are *ejusdem generis* with “furniture:” *Manton v. Tabois* (1885), 30 Ch. D. 92.

I think book debts are *ejusdem generis* with moneys in bank, notes, mortgages, as representing obligations for debts owing. But, whether this be so or not, the words “goods and chattels,” being broad enough to cover the book debts, I find nothing in the context to limit their meaning.



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It is, further, to be observed that the presumption is that the testator intended to dispose of the whole of his personal estate, which presumption is only overcome where the intention of the testator to do otherwise is plain and unambiguous: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 30, p. 668. See also *Re Way* (1903), 6 O.L.R. 614; *Re McMillan* (1902), 4 O.L.R. 415; *Smith v. Davis* (1866), 14 W.R. 942; *Re Hudson* (1908), 16 O.L.R. 165; *Campbell v. McGrain* (1875), Ir. R. 9 Eq. 397.

I am of opinion that the clause above mentioned is sufficient to pass book debts of the deceased. Costs out of the estate.

J. H. McGarry appealed from this decision.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 25th May, 1909.

A. W. Anglin, K.C., and F. W. Hill, for the appellant. Either there was an intestacy as to the book debts, as not being included in the bequest to the widow of "all goods and chattels whatsoever and wheresoever," or, if they were so included, the bequest was a residuary one, and the property therein comprised was applicable to the payment of debts before having resort to the undisposed of realty: *Hodgson v. Jex* (1876), 2 Ch. D. 122; *Re Hudson*, 16 O.L.R. 165; *Re McMillan*, 4 O.L.R. 415; *Re Way*, 6 O.L.R. 614; *Lysaght v. Edwards* (1876), 2 Ch. D. 499, *per* Jessel, M.R., at p. 513; *Jarman on Wills*, 5th ed., p. 711; *Armour on Devolution*, pp. 173, 181, and the case there referred to of *Re Hopkins Estate* (1900), 32 O.R. 315; *Theobald on Wills*, 7th ed., pp. 828, 829.

W. M. German, K.C., and D. B. White, for the respondents, referred to and relied on the cases cited in the judgment of Clute, J.

Anglin, in reply.

June 15. The judgment of the Court was delivered by BOYD, C.:—We agree with Mr. Justice Clute that the book debts are covered by the general words in the will giving to the widow "all goods and chattels whatsoever and wheresoever," and that there is no context which interferes with that construction.

But a point is raised on appeal which was not before him, namely, as to the proper method of administering the estate in regard to the payment of debts. This does not arise upon the construction of the will, but it was agreed that, in the interests of

all, it was desirable that the Court should give an opinion thereupon.

The will deals with certain lands and all the goods of the testator. The goods are given by general (not by specific or residuary) bequest to the widow, and nothing is said in the will as to the payment of debts. The deceased left some real property which is not mentioned or included in the will, and as to which he died intestate. As against the widow it is claimed that the debts should be paid out of the personalty in exoneration of the lands descended.

Under English authorities it is clear that the personal estate is the primary fund for the payment of debts, and that personalty bequeathed generally (as here) and not specifically must answer the debts in priority to land not disposed of by the will. That is the case even when the land is by the will declared to be subject to the payment of debts. The latest case is *In re Banks*, [1905] 1 Ch. 547, where the testator gave all personal estate to the widow, and devised real estate subject to the payment of his debts. The argument was that, because the whole personal estate was given to the widow, the Court should find in that fact an expression of intention that the personal estate should not bear the debts subject to which the real estate was devised. Buckley, J., held that two things must concur: (1) the will must charge the real estate with, and (2) discharge the personal estate from, the payment of debts. The exoneration of the personalty may arise either by express words or by an indication of intention to be found in the will which leads to the judicial satisfaction of the Court that it was the testator's intention to exonerate. He held that the will contained nothing more than a devise of the real estate subject to the debts, and that did not exonerate the personal estate.

In this Province, by statutory changes, the distinction between legal and equitable assets is abolished. All a man's property, real and personal, is on his death vested in the hands of his legal representative as "assets" for the payment of debts and for distribution in due course of administration as personal property: The Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 4. And as to real property, by sec. 9 the representative can deal with it "with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal

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property vested in them." The course of decision has been, since 1900, to regard personal property as the primary fund for paying creditors. This was decided in that year by Mr. Justice Street in *Re Hopkins Estate*, 32 O.R. 315; and next year Meredith, C.J., said, in *Re Tatham* (1901), 2 O.L.R. 343, 348, that the general personal estate not specifically bequeathed was to be first applied in the payment of debts. And, again, in 1906, Mr. Justice Teetzel, in *In re Moody Estate*, 12 O.L.R. 10, held that the personal estate was primarily chargeable.

I find that this principle of administration has been applied generally in the United States, where by statute, as with us, real and personal property is made a comprehensive fund in the hands of the personal representative as assets to be duly administered. The rule there laid down is that realty is not to be sold to pay creditors until the personal estate is exhausted: *Titterington v. Hooker* (1875), 58 Mo. 593, 598, as applied in *Pearce v. Calhoun* (1875), 59 Mo. 271, 274.

So in New York the distinction no longer prevails as to legal and equitable assets: all property is made assets in the hands of the personal representative to be distributed, and the proceeds of realty are to be dealt with in the same manner and course of administration, as far as respects debts, as the personal estate. It is there held that, as between heirs and next of kin, the personal estate is the fund primarily to be drawn upon: *Bloodgood v. Bruen* (1851), 2 Bradf. 8, and *Taylor v. Taylor* (1854), 3 Bradf. 54.

Again, in Pennsylvania there is no distinction between legal and equitable assets, and I find a case on all fours with the present, which was very ably argued by eminent counsel, to this effect. Personal estate was bequeathed to the wife, but not specifically, and there was nothing in the will to indicate that it was to be exempt from the payment of debts. That estate was held to be applicable to pay creditors before resort could be had to some real estate acquired after the will, and as to which there was intestacy. The judgment of Rogers, J., deserves careful consideration: *Walker's Estate* (1832), 3 Rawle 230. The case was followed in *Risk's Appeal* (1885), 110 Pa. St. 171.

Upon analogous legislation in England, under the Lands Transfer Act of 1897, where real and personal estate devolves upon the legal personal representative for purposes of administration, the change is regarded as intended to simplify and

improve the machinery for the administration of real assets without altering in any manner the ultimate rights of the persons beneficially interested in the proceeds of such assets: *per* Joyce, J., in *In re Williams*, [1904] 1 Ch. 52, 56. In a text-book of accuracy it is said to be a fallacy to suppose that the Act creates a "mixed fund" of realty and personalty in the sense in which, upon the construction of a will, a mixed fund is said to be created by the testator: Robbins & Maw's *Devolution of Real Estate*, 4th ed., p. 328.

Contrary to my first impression, I think we should not disturb the earlier decisions in this country as to personalty being still the primary fund for creditors.

In the case in hand I do not think we can find sufficient indication of the testator's intention to relieve the personalty from paying the debts. It is to be assumed that he knew the law; that he knew that, in the absence of any direction by him, both his real and personal estates were subject to the payment of his debts. He made a will as to personalty, but gave no direction as to the payment of debts, but he knew that his personal estate was, nevertheless, subject to pay them. He died intestate as to some lands, and he knew that the law would render them subject to the payment of his debts. How can it be judicially inferred that, from the language in the will, he intended that resort should be had first to the lands descended? Can it be reasonably said that he died intestate supposing that the law would first satisfy his debts out of the undisposed-of lands, leaving the personal estate intact? Can any one do more than conjecture why he did not die testate as to these lands? If the law does not create a mixed fund of lands and personal property for the ratable payment of debts, and so make the debts to be borne partly by each, I do not think a clear, unmistakable expression of intention can be drawn from the will, or even from the will coupled with the partial intestacy, which, upon the authorities, would relieve the personal estate and burden the land of the intestate with the debts. An old case which goes furthest in this direction is *Feltham v. Harlston* (1678), 1 Lev. 203, but it was discredited in *Aldridge v. Wallscourt* (1810), 1 B. & B. 312.

The costs of the further argument should not be borne by the general estate, but by the lands descended, and all costs out of that.

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## [DIVISIONAL COURT.]

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FARMERS BANK v. BLOW.

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April 26

*Banks and Banking—Subscription for Shares—Subscription Conditional on Bank Opening Branch—Parol Evidence—Payment for Shares—Bank Act—R.S.C. 1906, ch. 29, secs. 37, 38.*

The defendant subscribed in writing for shares of a bank "on the strength of the bank agreeing to open a branch at S.," and the bank did so, but closed it five months afterwards:—

*Held*, that the defendant was bound to pay for the shares; and parol evidence that the agent who obtained his subscription promised that a branch would not only be opened but maintained at S., was inadmissible.

*Held*, also, that notwithstanding secs. 37 and 38 of the Bank Act, R.S.C. 1906, ch. 29, directors of a bank may agree with a shareholder as how his shares shall be paid for—at all events, when the times for payment are to be such as they might fix under sec. 38 if there were no agreement.

THIS case, which was an appeal by the defendant from the judgment of the county court of the county of Oxford, of June 19th, 1908, at the trial of this action, was argued before MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ., on February 18th, 1909.

*C. Millar* and *J. Carruthers*, for the appellant, contended that the document evidencing the subscription for the shares did not contain the whole contract; that the term of the agreement as to the opening of the bank was not complied with, and that the agreement was invalid in respect to the payment of the money: Bank Act, R.S.C. 1906, ch. 29, secs. 37, 38.

*L. F. Heyd*, K.C., for the plaintiff, referred to *Port Hope Brewing and Malting Co. v. Cavanagh* (1906), 8 O.W.R. 985.

*Millar*, in reply, cited *In re Zoological and Acclimatization Society of Ontario, Cox's Case* (1889), 16 A.R. 543.

April 26. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant from the judgment of the county court of the county of Oxford, dated December 19th, 1908, after the trial, without a jury, on the 10th of the same month, before Colter, county Judge, sitting for the Judge of that Court.

The action is brought to recover from the appellant the amount alleged to be due by him in respect of two shares of \$100 each of the capital stock of the respondent bank, for which the appellant is alleged to have subscribed at 25 per cent. premium, and to

have agreed to pay for as follows: \$12.50 per share when the respondents should open for business at Springford, \$12.50 per share "upon allotment and transfer" of the shares, and \$10 per share per month for ten months, commencing thirty days after allotment, and continuing at intervals of thirty days thereafter until the whole should be paid.

The shares were allotted to the appellant on November 20th, 1907, and notice of the allotment was given to him on the same day.

The respondents opened for business a branch bank at Springford on November 12th, 1907.

Two questions were raised by the appellant at the trial and on the argument before us: (1) that his subscription for the shares was conditional on the respondents opening, carrying on, and maintaining a branch of their bank at Springford; (2) that the respondents had no authority or power to accept a subscription for shares on the terms as to payment to which I have referred.

The appellant's agreement to subscribe for the two shares is in writing, and by it he agreed to subscribe for two shares of the capital stock of the respondent bank of the par value of \$100 each, at a premium of \$25 per share, "on the strength of the said bank agreeing to open a branch at Springford," and to pay for the shares by the instalments and in the manner already mentioned.

According to the findings of the learned county court Judge, the respondents opened a branch of their bank at Springford about November 15th, 1907, and closed it about the end of April following, after a fair trial, with the result that sufficient business was not offered to enable the branch to be carried on except at a loss, and these findings are fully warranted by the evidence.

An attempt was made by the appellant to shew that he subscribed for the shares on the verbal promise of one Lindsay, who solicited and obtained his subscription, that a branch of the bank would not only be opened but be maintained at Springford.

This was contradicted by Lindsay, and it is impossible, therefore, to find, and the learned Judge did not find, that the alleged promise was made.

As the learned Judge points out, the appellant is seeking to

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vary by parol the written agreement which he entered into, and evidence of the verbal promise was not, therefore, admissible. It was, moreover, if made and binding on the respondents, not a condition precedent, but a promise the breach of which would not entitle the appellant to repudiate his subscription, but for which an action for damages would be his appropriate remedy.

The other question depends upon the effect to be given to secs. 37 and 38 of the Bank Act (R.S.C. 1906, ch. 29).

Sub-section 1 of sec. 37 is as follows:—

“(1) The shares of the capital stock shall be paid in by such instalments and at such times and places as the directors appoint.”

And sec. 38 is as follows:—

“38. The directors may make such calls of money from the several shareholders for the time being, upon the shares subscribed for by them respectively, as they find necessary.

“2. Such calls shall be made at intervals of not less than thirty days.

“3. Notice of any such call shall be given at least thirty days prior to the day on which the call is payable.

“4. No such call shall exceed ten per centum of each share subscribed.”

It was argued by the learned counsel for the appellant that the mode provided for by these sections was the only one authorized, and that such an agreement for paying for the shares as was made with the appellant was *ultra vires*, and the subscription, therefore, not binding on him.

In our opinion, there is nothing in either of these provisions which prevents the directors of a bank from agreeing with a shareholder as to the manner in which his shares shall be paid in—at all events, when the times for payment agreed on are such as the directors, if there were no agreement as to it, might fix, under sec. 38.

It was so decided by my brother MacMahon in *Port Hope Brewing and Malting Co. v. Cavanagh*, 8 O.W.R. 985, and his decision is in accordance with the jurisprudence of several of the States of the neighbouring union: *New Albany and Salem R.R. Co. v. Pickens* (1854), 5 Ind. 247; *Ross v. Lafayette and Indianapolis R.R. Co.* (1855), 6 Ind. 297; *Breedlove v. Martinsville and Franklin R.R. Co.* (1859), 12 Ind. 114; *Estell v. Knightstown*

and Middletown Turnpike Co. (1872), 41 Ind. 174; *Waukon and Mississippi R. Co. v. Dwyer* (1878), 49 Iowa 121; *Ruse v. Bromberg* (1889), 88 Ala. 619; *Williams v. Taylor* (1904), 99 Md. 307; Cook on Corporations, 6th ed., par. 106.

The appeal, in our opinion, fails, and must be dismissed with costs.

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[DIVISIONAL COURT.]

DOMINION EXPRESS CO. v. KRIGBAUM.

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*Principal and Agent—Agency for Sale of Money Orders—Carriers—Contract—Undertaking of Agent to Account for Orders and Proceeds—Theft and Forgery by Servant of Agent—Payment—Liability of Agent.*

Jan. 22.  
Apr. 16.

The defendant, on appointment as agent for the sale of the signed money orders of an express company, agreed in writing to be responsible for the "due issue and sale thereof" and "to account for each money order and the proceeds thereof." An employee of the defendant stole a book of money orders, forged the defendant's counter-signature (which was required), and issued orders which the plaintiffs, being unaware of the forgeries, paid, and now brought this action for the amount:—

*Held*, that the defendant was not liable, inasmuch as the money orders in question had not been issued or sold by him, and that he had duly accounted for them by shewing that, without negligence on his part, they had been stolen from him, and he was therefore unable to return them.

*Semble*, also, that, even if the orders had in fact been countersigned by the defendant, they would not have been binding on the company, inasmuch as to issue them, when the money they represented had not been received by him, would be an act outside the scope of his authority as agent, and for this reason the plaintiffs could not recover.

*Erb v. Great Western R.W. Co.* (1877-1881), 42 U.C.R. 90, 3 A.R. 446, 5 S.C.R. 179, followed.

*Held*, further, that, even if there was a breach of the defendant's contract, the plaintiffs suffered no damage by it, as they incurred no liability to the payee or transferee of the money orders, inasmuch as neither of the latter would be entitled to sue upon them, there being no privity of contract between them and the plaintiffs.

THIS was an appeal by the defendant from the judgment of Latchford, J., on motion for judgment made before him in the Weekly Court, on January 20th, 1909, in the circumstances set out in the judgments.

*Shirley Denison*, for the plaintiffs.

*R. J. McLaughlin*, K.C., for the defendant.

January 22. LATCHFORD, J.:—Motion for judgment upon



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the pleadings and the admissions contained in the defendant's examination for discovery and the exhibits therein referred to.

The plaintiffs issue what are called "express money orders," by which, when countersigned by the agent at point of issue, they agree to pay to the order of a person, whose name is filled in by the agent, a certain sum of money. The orders are issued in books, which are delivered to those desiring to act as agents. The defendant received such a book of money orders from the plaintiffs early in 1908. He signed an agreement, which, so far as appears material, is in the following words:—

"I, L. A. Krigbaum, of the city of Toronto, having been appointed by the Dominion Express Company as agent for the sale of its signed money orders, do hereby accept the responsibility of due issue and sale thereof, and undertake to account for each money order and the proceeds thereof . . . to hold in trust such proceeds . . . and to pay over the whole of said proceeds from time to time to the Express Company as required, after deducting as may be authorized by it my lawful commission, and not to deal with or use such money orders or the proceeds, either in whole or in part, in any other manner."

Krigbaum had acted as agent for the plaintiffs in issuing similar orders from November or December, 1906, and used the orders in remitting to his creditors. The commissions charged upon the orders were divided between the agent and the company, the agent retaining one-third and paying the company two-thirds. In January, 1908, one Heyburn, an employee of the defendant, stole a book of money orders; and, forging the defendant's name, and, on two occasions, the name of a fellow employee, issued orders to the amount of \$470, which the plaintiffs, who were unaware of the forgeries, paid. They claimed the \$470 in the writ and statement of claim, but that amount has since been reduced by \$100 which they recovered, and they now seek to hold the defendant liable for the balance—\$370.

The defendant says he did not issue the orders in question, and that it is impossible to return the orders received from the plaintiffs.

It is not disputed that the defendant took reasonable and proper care of the book of money orders delivered to him. If he were an ordinary bailee without more, he would not be responsible. But his liability must be determined upon his contract.

"A bailee may assume a greater obligation than the law would impose upon him under the circumstances; that is to say, the law will enforce against him the very terms of his contract, in their fair meaning:" *Grant v. Armour* (1894), 25 O.R. 7, at p. 10. The defendant accepted responsibility for the "due issue and sale" of the orders. The stolen orders were not duly issued and sold. He undertook to account for "each money order," and for the proceeds thereof, and to pay over such proceeds to the plaintiffs. He says he is excused because of the impossibility to account for the orders resulting from the theft committed by Heyburn. The defendant, however, took upon himself to warrant the return of each money order and of the proceeds of each money order, and it is not, upon his contract and authority, open to him to object because of the impossibility: *Grant v. Armour, supra*; *Clifford v. Watts* (1870), L.R. 5 C.P. 577, at p. 586. The fact that Heyburn forged Beatty's name to two of the orders and Krigbaum's name to all of them, does not, in view of the terms of the contract, relieve the defendant from the liability he assumed.

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It is also said that, as the orders were not countersigned by the defendant, the plaintiffs should not have paid them, and *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49, and other like cases, are relied on to sustain this contention. This argument would be cogent but for the defendant's contract. His liability has to be determined by the fair meaning of that. I think he is liable under it for the amount claimed, and direct that judgment be entered against him for \$370, interest, and costs.

The defendant appealed, and the appeal was argued on February 19th, 1909, before MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

*R. J. McLaughlin*, K.C., for the appellant, contended that the defendant's contract only contemplated accounting for all money orders duly issued; that no negligence was charged against him; and that he had been guilty of mere misfeasance at the most. He referred to *Germania Savings Bank v. Village of Suspension Bridge* (1893), 26 N.Y. Supp. 98; *Grant v. Armour*, 25 O.R. 7; *Conflans Stone Quarry Co. v. Parker* (1867), L.R. 3 C.P. 1.

*Shirley Denison*, for the respondents, contended that the defendant was bound to see to the due issue of the orders, and

D. C. had been negligent: *Bank of England v. Cutler*, [1908] 2 K.B. 208;  
1909 *Deverill v. Burnell* (1873), L.R. 8 C.P. 475.

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April 16. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant from the judgment of Latchford, J., dated January 22nd, 1908, after motion for judgment made to him on the 20th of the same month.

The principal facts are stated in the judgment of my learned brother, and it is not, therefore, necessary to repeat them.

It is to be borne in mind, in construing the agreement sued on, that the respondents are not bankers but carriers, and that a part of their business is to receive money from customers for transmission.

Upon receipt of money from a customer a document is given to him signed on behalf of the company, and, where the transaction takes place at an agency, countersigned by the agent. This document is headed "express money order," and by it the company "agrees to transmit and pay to the order" of the person to whom the money is to be sent the money, and at the foot of the document are the words "name of remitter," beneath which the name of the person transmitting the money is signed. The document has at the upper left hand corner the words "when countersigned by agent at point of issue," which are intended to qualify the words of agreement.

The respondent company is, or was at the time the transaction in question took place, in the habit of appointing as agents persons whose business required the transmission of money by them, and of supplying them with blank forms of these express money orders signed on behalf of the company. The appellant, who carried on business as the Canadian Newspaper Association, was one of the persons so appointed, and he was furnished with a number of these forms so signed. A man named Heyburn, who had been but was not then a clerk in his employment, stole a number of the forms, forged the name of the appellant to the countersigning of them, and put them off. They were made payable in some cases to his own order, and in others to the order of a fictitious person, and all of them were presented at an agency of the respondent company and paid there, and it is to recover the amount so paid that the action is brought.

The obligation of the appellant, according to the terms of the agreement, was:—

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(1) To accept the responsibility of "due issue and sale" of the money orders.

(2) "To account for each money order and the proceeds thereof."

(3) "To hold in trust such proceeds and every part thereof entirely separate from other funds in" his "hands, and to pay over the whole of said proceeds from time to time to the express company as required," after deducting, as should be authorized by the respondent company, his lawful commission and the amount of other express orders or cheques authorized by the company to be paid by him.

(4) "Not to deal with or use such money orders, or the proceeds thereof, either in whole or in part, in any other manner."

Having regard to the nature of the business to be transacted by the appellant for the respondent company, the effect of the agreement was that the appellant became answerable that none of the money orders should be issued and sold unless he had received for transmission the money which it represented, and to constitute him a trustee for the respondent company of the moneys so received, with the obligation to keep them separate from his own moneys and to pay them to the company when required after making the deductions mentioned in the agreement, and not to deal with or use the money orders or their proceeds, *i.e.*, the money received for transmission in respect of them, in any other manner.

No moneys were received by the appellant in respect of the money orders in question. The appellant is answerable, therefore, in the circumstances under which the money orders in question were dealt with, only, if at all, by reason of his having by the agreement assumed the responsibility of "due issue and sale" of the orders, or by reason of his having undertaken to account for those which were entrusted to him.

That these money orders were not issued or sold by the appellant does not, I think, admit of any doubt. They were stolen from him, as I have said, and filled up, countersigned, and presented for payment by the thief. There is no evidence that they were sold by the thief or by any one else, or that any of them passed into the hands of any third person. I do not think that by accepting the responsibility of "due issue and sale" the appellant undertook



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to be answerable to pay to the company the amount of money orders dealt with in the way in which those in question were dealt with. The fair meaning of the words is, I think, that he was to be responsible that no order should be issued unless the money which it represented was first received by him for transmission; in other words, that he would not issue or sell any money order which would have the effect of rendering the respondent company answerable to the holder of it unless in the due course of the business he was appointed to transact, that is to say, unless he had received for transmission the money which it represented. If that be the meaning of this provision of the agreement, there was, I think, no breach of it, because the money orders in question were not issued or sold by the appellant.

Nor do I think that there was any breach of the appellant's agreement to account for the money orders in question or the proceeds of them. I do not understand the provision of the agreement as to accounting to mean that the appellant was to return to the company the money orders entrusted to him or such of them in respect of which what is called the proceeds of them he did not pay over to the company. He has, in my opinion, accounted for those in question by shewing that without negligence on his part they have been stolen from him, and he is therefore unable to return them. Much clearer and much stronger language than is used would be needed, in my opinion, to impose upon the appellant such a liability as the respondent company are seeking to impose upon him.

But, assuming that the appellant is liable to the extent contended for by the respondent company, I am unable to see how they can recover. The money orders, even if they had been countersigned by the appellant himself, would not have been binding on the company, though issued by him, unless the money which they represented had been received by him for transmission by the company.

I am unable to distinguish this case from *Erb v. Great Western R.W. Co.* (1877-81), 42 U.C.R. 90, 3 A.R. 446, 5 S.C.R. 179. In that case an agent of a railway company had in fraud of the company issued a bill of lading for flour, stated in it to have been delivered to the company to be carried from Chatham to St. John, when in fact none had been delivered; the bill of lading was delivered

to the plaintiffs, the consignees named in the bill of lading, and on the faith of the bill of lading the plaintiffs accepted a bill of exchange drawn on them by the persons named in the bill of lading as the shippers for the price of the flour, and sought to make the company liable for the loss sustained by them by having to pay the bill of exchange without receiving the flour, basing their claim to recover on an alleged false and fraudulent representation contained in the bill of lading that the flour had been shipped to them, on the faith of which they had accepted the bill of exchange. The plaintiffs failed in the action, the ground of the decision being that the act of the agent in issuing the false and fraudulent receipt for goods never delivered to him was not an act done within the scope of his authority as the company's agent, and that the company was not therefore liable.

As I have said, I am unable to distinguish the case at bar from that case. The appellant had no authority to issue the money orders in question, and they were issued in fraud of the company, and the fact that in the one case it was money that was to be transmitted and in the other it was flour to be delivered can make no difference in the application of the principle upon which the decision in the *Erb* case was based.

There is, I think, a further ground upon which the respondents must fail.

The money order is not a bill of exchange, but an agreement with the "remitter" to transmit and pay to the order of the payee of it the sum mentioned in it, and neither the payee nor the endorsee of it would be entitled to sue upon it, there being no privity of contract between him and the respondents.

For the last two reasons, assuming that there was a breach of the appellant's contract, the respondents suffered no damage by reason of it, as they incurred no liability to the payee or transferee of the money orders.

I would, therefore, allow the appeal with costs, and reverse the judgment of my brother Latchford, and substitute for it a judgment dismissing the action with costs.

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## [IN THE COURT OF APPEAL.]

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LINDEN V. TRUSSED CONCRETE STEEL CO.

1908

April 21.

*Master and Servant—Injury to Servant—Hazardous Employment—Unskilled Workman—Absence of Guard—Workmen's Compensation Act—Defect in Ways, Works, etc.—Negligence—Fatal Accidents Act—Action by Widow of Workman—Infant Children—Parties—Damages—Jury—Powers of Trial Judge.*

The defendants, who were contractors for the erection of an eight-story building, used an outside hoist for the purpose of raising the materials required in the construction of the different floors. The hoist stood close against the building, and was made in sections, a new section being added as each floor was reached. It was necessary for the workmen to work upon a platform 8 ft. square, to the corners of which uprights were fixed and secured on the outside by braces. When the last or roof section of the hoist was being erected, the plaintiff's husband, an ordinary labourer employed by the defendants to assist the skilled carpenters whose duty it was to construct the hoist, in stepping forward quickly, stumbled and fell off the platform, receiving injuries which caused his death on the following day. There was some evidence that the planks forming the platform were rough and of unequal thickness. The jury found that the accident was caused by the negligence of the defendants, by not having a guard on the inside of the uprights, and by the unevenness of the platform; that the deceased could not have avoided the accident by the exercise of reasonable care; and that he was not aware of the condition of the hoist:—

*Held*, that, even although it should be considered that there was no evidence that the floor was in fact uneven, or of how the deceased came to fall, the plaintiff was entitled to succeed under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, clause 1, as qualified by sec. 6, clause 1, inasmuch as the death of her husband was found to be caused by a "defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer," and the defect "had not been discovered or remedied owing to the negligence . . . of some person entrusted (by the employer) with the duty of seeing" that the condition or arrangement of the same was proper. The position of an ordinary labourer, like the deceased, was different from that of the skilled workmen who had undertaken the construction of the hoist, and he was entitled to every reasonable safeguard in the performance of so hazardous a duty.

*Brown v. Watrous Engine Works Co.* (1904), 8 O.L.R. 37, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., at the trial, affirmed.

The action being brought by the widow alone, without mention of the infant children of the deceased, it was ordered that they should be added as parties plaintiffs, with proper averments in the statement of claim, or that the latter should be amended so as to shew that the action was brought on their behalf as well as on behalf of the widow, as required by sec. 8 of the Fatal Accidents Act.

*Quære*, whether the trial Judge had power to enter judgment for a sum greater than the statutory maximum of \$1,500, where the jury were not asked to and did not assess the damages under the Workmen's Compensation Act, but only as at common law.

ACTION by Janet Linden against the Trussed Concrete Steel Company, to recover damages for the death of her husband, Henry Vander Linden; who was killed on the 20th May, 1905, while working in the employ of the defendants. The facts are stated below.

The action was tried before Falconbridge, C.J.K.B., and a jury, at Toronto, on the 4th March, 1907, and, after certain questions had been answered by the jury, judgment was reserved. On the 8th March, 1907, the trial Judge delivered judgment in favour of the plaintiff for \$1,600 and costs.

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From this judgment the defendants, by special leave, appealed directly to the Court of Appeal, and the appeal was heard by OSLER, GARROW, and MACLAREN, JJ.A., on the 28th January, 1908.

*J. M. Godfrey*, for the appellants. The jury found the defendants negligent on two grounds: first, that the accident was caused by an inequality in the boards of the flooring of the platform on which the deceased was working, and second, that the platform was not protected by a proper guard. No evidence was called by the defendants. There was no finding by the jury to the effect that the deceased was an incompetent person who should not have been employed on work of such a nature. As to the other grounds on which negligence was alleged, there was no evidence to go to the jury, and the plaintiff should have been nonsuited.

*E. E. A. DuVernet*, K.C., for the respondent. The class of work on which deceased was employed was one requiring skill and experience, and it was known to the superintendent that deceased had not the requisite qualifications, but was merely a common labourer. The cases of *Mitchell v. Canada Foundry Co.* (1904), 35 S.C.R. 452, and *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, were referred to.

*Godfrey*, in reply. In the *Mitchell* case negligence was admitted by the foreman. The question is not as to negligence in the abstract, but as to what is known as "proximate" negligence, and of that there was no evidence.

April 21, 1908. OSLER, J.A.:—The action was brought under the Fatal Accidents Act, R.S.O. 1897, ch. 166, by the widow of Henry Vander Linden, to recover damages for the death of her husband. The claim was based upon negligence at common law, and also upon the Workmen's Compensation Act. The jury assessed the damages generally at \$3,000, but the learned trial Judge held that the action was maintainable upon the Workmen's Compensation Act only, and entered judgment for the plaintiff for \$1,600, the amount of the estimated earnings, during three years preceding the injury,



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of a person, *sc.*, the deceased, in the same grade of employment as the deceased.

Though it appeared from the evidence that the deceased and the plaintiff had three infant children then living, the action was not brought on their behalf. They are not mentioned in the statement of claim, no claim was made on their behalf at the trial, nor were they alluded to in the Judge's charge. It does not appear whether there is any executor or administrator of the deceased, and the action was brought by the widow within six months after the death. There is no cross-appeal, but I think that in the interest of these infants they must be added as parties plaintiffs, with proper averments in the statement of claim, or that the latter should be amended so as to shew that the action is brought on their behalf as well as on behalf of the widow, as required by sec. 8 of the Fatal Accidents Act. The damages can then be apportioned by the trial Judge, or some other Judge, under sec. 9. Notice of this direction is, if necessary, to be given to the Official Guardian.

Concisely stated, the facts disclosed by the evidence are these: the defendants were contractors for the erection of an eight-story building in Toronto of about 90 feet in height. One Taylor was the superintendent of construction. At the time the deceased met with his death the roof had been reached and was ready to be concreted. For the purpose of raising the concrete and other materials required in the construction of the different floors, an outside hoist was used on which the hoisting apparatus was worked. It stood close against and was temporarily fastened to the building, its height keeping pace with the growth of the latter by the addition of a new section as each floor was reached. Each section was made by laying a temporary platform or floor 8 feet square on the top of the last, fixing and splicing an upright of about 16 feet in height at each corner, and securing these by top, diagonal, and side braces. The temporary floor was then removed.

On the morning of the 20th May, 1906, the last, or roof section, of the hoist was being erected by two skilled carpenters accustomed to work on high buildings. They required an assistant, and the superintendent sent up the deceased, who had worked with them before in putting up the two sections immediately below. The floor or platform was down, and Prince,

one of the other workmen, was about to fasten to the uprights one of the diagonal braces, consisting of a plank. The braces were fastened on the outside of the uprights, and the deceased was called to help Prince by holding up one end of it while Prince nailed the other. As he stepped forward quickly to do so, he stumbled at something, pitched forward against the plank, knocking it out of Prince's hands, and, falling out with it upon the roof of a building below, received injuries from which he died on the following day.

There was evidence that the planks forming the platform were rough and of unequal thickness, differing as much as a quarter of an inch in some places, and the description of the accident, as detailed by one of the deceased's fellow workmen, would justify the inference, which the witness himself drew from what he saw, that the fall of the deceased was caused by one foot catching in or against some unevenness in the floor. A witness, a master carpenter, said that such a floor, used for the purpose of working at a great height, ought to have been smoothed and the edges trimmed with an adze for the very purpose of preventing a man from tripping upon it.

It was further contended by the plaintiff that the hoist ought to have been braced from the inside or that temporary guards should have been put up, either of which methods of constructing it would have prevented the deceased from falling out.

Lastly, it was said that the superintendent ought not to have sent the deceased to work at so great a height, as he was not accustomed to work there and was likely to get dizzy and fall.

These were the three grounds of negligence relied upon.

The questions submitted to the jury, with their answers, are as follows:—

"1. Was the fall of Henry Vander Linden from the hoist or scaffold caused by reason of any negligence of the defendants? A. Yes.

"2. If so, wherein did such negligence consist? A. By not having a guard on the inside and by the unevenness of the platform.

"3. If you find that his fall was caused by any defect in the condition or arrangement of the ways, works, machinery, and plant connected with the business of the defendants, what was or were such defect or defects? A. Not using proper care in having a guard.

"4. Was the fall of the said Linden caused by reason of the

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negligence of any person in the employ of the defendants to whose orders or directions Linden at the time of the injury was bound to conform and did conform? A. Yes. (In answer to a question by the trial Judge, 'Did you have in your minds any particular person to whose orders Linden conformed?' the foreman of the jury replied, 'the foreman.')

"5. If you find that any defect existed in the condition or arrangement of the ways, works, machinery, and plant connected with the business of the defendants, did such defect arise from, or had it not been discovered or remedied, owing to the negligence of the defendants or of some person entrusted by them with the duty of seeing that the condition and arrangement of the ways, works, machinery, and plant connected with the business of the defendants, particularly the said hoist or scaffold, was proper? A. Yes.

"6. Could the said Linden, by the exercise of reasonable care, have avoided the accident? A. No.

"7. If you find that he could, what ought he reasonably to have done to avoid the accident? (Not answered.)

"8. Was the said Linden aware of the condition of the said hoist or scaffold, and did he fail, without reasonable cause, to give information thereof to the defendants or to some person superior to him in the service of the defendants? A. Not aware.

"9. At what sum do you assess the compensation to be awarded? A. \$3,000."

The learned Judge thereupon directed judgment to be entered for the plaintiff for \$1,600, saying that, "while he thought there was evidence to go to the jury on the claim at common law, yet the findings were not sufficiently condemnatory of the system as a system to justify him in entering a verdict for the full amount found; that it was evident, however, that under the Workmen's Compensation Act the jury would give all that is allowed, and that he thought there was evidence which fully justified a finding of \$1,600 as the three years' earnings."

Whether the learned Judge had power to enter judgment for more than the statutory maximum of \$1,500 may be doubted. Where the verdict of the jury is, as it was here, for a sum which could only have been awarded as damages for negligence at common law, and the action is held to be maintainable only under the Work-

men's Compensation for Injuries Act, the statutory maximum of \$1,500 may well be adopted as a sum which the jury would certainly have given, but if more than that is demanded, as based upon estimated earnings, my present impression is that it is then a matter for the jury to determine, and that it is not for the Judge to assess the damages upon the evidence. All difficulty may be avoided by requiring the jury to assess the damages in the alternative, as is usually done. No objection, however, having been made to the course taken by the learned Judge, it is not necessary to do more than call attention to the subject.

As regards the merits, I am of opinion that the plaintiff is entitled to succeed under the Workmen's Compensation for Injuries Act, sec. 3, clause 1, as qualified by sec. 6, clause 1. The death of her husband is found to have been caused by reason of a defect in the condition or arrangement of the ways, works, buildings, or premises connected with, intended for, or used in the business of his employer, and the defect had not been discovered or remedied, owing to the negligence of some person entrusted by the employer with the duty of seeing that the condition or arrangement of the same was proper. The position of the deceased was very different from that of the skilled workmen who had undertaken the construction of the hoist. He was merely an ordinary labourer who had been sent up to assist them by carrying material and handing it to them, and for such a person the situation was one of extraordinary danger, working as he was upon a small platform from which an inadvertent movement or accidental stumble was very likely to precipitate him to almost certain death; and, to use the language of Idington, J., in *Jamieson v. Harris* (1905), 35 S.C.R. 625, at p. 637, "he was entitled in law at the hands of the defendant, in the discharge of so risky a duty, to the reasonable safeguards that a prudent, careful man under the circumstances must have seen necessary for the purpose of protecting one of his servants so placed." I refer also to *Brannigan v. Robinson*, [1892] 1 Q.B. 344.

There is evidence that a reasonably sufficient guard could easily have been made for temporary purposes by means either of a temporary brace nailed to the inside of the uprights or of a rope passed round them, or by adopting a different method of putting up the permanent braces, viz., by placing them on the inside instead of the outside of the uprights, any of which expedients would in all probability have averted the accident.

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The defect found by the jury in the condition of the works thus intended for the business of the employer was the absence of a guard. They find this to have been negligence causing the death. By their second answer they also impute negligence in respect of the unevenness of the floor of the platform, but this is not found as a defect in the condition of the works in the answer to the third question. It was strongly pressed upon us that there was no evidence that the floor was in fact uneven, or of how the deceased came to fall. I do not agree with this contention, but, even if it were sound, the findings as to the guard render it unimportant, since there can be no question upon the evidence but that the unfortunate man did stumble in some way, no matter how, but without fault on his part, and in consequence fell off the platform because there was nothing to prevent him from doing so. These facts do not depend upon conjecture, and take the case quite outside that of *Brown v. Waterous Engine Works Co.* (1904), 8 O.L.R. 37.

Other findings, not impeached and supported by the evidence, complete the cause of action under the Workmen's Compensation for Injuries Act, and I would therefore dismiss the appeal.

GARROW and MACLAREN, JJ.A., concurred.

[This judgment was affirmed by the Supreme Court of Canada on the 17th November, 1908.]

G. G.

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[LATCHFORD, J.]

CHEVRIER V. TRUSTS AND GUARANTEE CO.

1909

May 29.

*Contract—Interest in Mining Claim—Statute of Frauds—Mining Act of Ontario, 1908, sec. 71—Application to Rights Arising before Enactment.*

Section 71 of the Mining Act of Ontario, 1908, provides that no person shall be entitled to enforce any claim, right, or interest, contracted for or acquired before the staking out, to or in any mining claim staked out or recorded in the name of another person, unless the fact that the former is so entitled is made to appear by a writing signed by the holder of the claim, etc., and that where a right or interest is so made to appear, the provisions of the Statute of Frauds shall not apply. The Act came into force on the 15th May, 1908, and this action, brought to enforce a claim or interest such as is mentioned in sec. 71, based upon a writing signed in 1906, was not commenced until February, 1909:—

*Held*, that sec. 71 applied to the action, and prevented the application of the Statute of Frauds. Section 4 of the Statute of Frauds (sec. 5 of R.S.O. 1897, ch. 338) does not invalidate the contract, but merely prohibits the bringing of an action in certain cases.

THIS was an action brought by Alfred H. Chevrier against the Trusts and Guarantee Company Limited, as administrators of the estate of Charles E. Turner, deceased, to enforce an agreement made between the plaintiff and the deceased, whereby the deceased agreed to transfer to the plaintiff a one-half interest in any mining claims which he might locate upon a prospecting trip. The defendants pleaded, among other defences, the Statute of Frauds, and the plaintiff by his reply raised the question whether the defence of the Statute of Frauds was a good defence and one which the defendants were entitled to set up in this action.

On the 1st May, 1909, an order was made by LATCHFORD, J., upon the application of the plaintiff, under Con. Rule 259, providing that the plaintiff should be at liberty to set down for hearing and disposition by the Court the point of law so raised by the plaintiff's reply.

The point of law was argued before LATCHFORD, J., in the Weekly Court at Ottawa, on the 8th May, 1909.

*M. J. Gorman*, K.C., for the plaintiff. The Statute of Frauds does not apply to an agreement of this kind: McPherson and Clark's Law of Mines, pp. 43, 44; Am. & Eng. Encyc. of Law, 2nd ed., vol. 29, p. 898. If the Statute of Frauds applies, the Mining Act of Ontario, 1908, 8 Edw. VII. ch. 21, sec. 71, is retroactive, because this is a matter of procedure: Maxwell on Interpretation of Statutes,

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4th ed., p. 333 *et seq.*, and cases cited, particularly *Towler v. Chatterton* (1829), 6 Bing. 258; *Marsh v. Higgins* (1850), 9 C.B. 551. The section of the Statute of Frauds pleaded did not, if applicable, *invalidate* the contract, but only took away the remedy for enforcement, in which respect it differs from sec. 17 (Ontario sec. 12.)

A. C. Macdonell, K.C., for the defendants. The enactment pleaded is sec. 5 of R.S.O. 1897, ch. 338; it is a bar to the action; the defendants have done nothing to disentitle themselves to the benefit of that section or to plead it. The agreement on which the action is based was made on the 11th September, 1906; Turner died in January, 1907; and the Mining Act of Ontario, 1908, did not come into force until the 15th May, 1908; consequently that Act did not apply to the agreement when made nor afterwards; and sec. 71 cannot now be invoked to support it. That section is not one merely prescribing procedure, but takes away a right. That section cannot affect sec. 4 of 29 Car. II. ch. 3.

May 29. LATCHFORD, J.:—The action is brought upon a memorandum dated the 11th September, 1906, signed by the late Charles E. Turner, whereby, for the consideration of \$50, he agreed to transfer to the plaintiff a one-half interest in any mining claims which he might acquire on his prospecting trip wherever he might locate “in or around Cobalt district.”

Turner died in January, 1907, after acquiring certain mining claims, which, it is contended by the plaintiff, are within the area mentioned in the agreement. If sec. 4 of the Statute of Frauds (sec. 5 of R.S.O. 1897, ch. 338), applies, the plaintiff cannot maintain his action. The Mining Act of Ontario, 1908, 8 Edw. VII. ch. 21, came into force on the 15th May, 1908. The writ of summons herein issued on the 15th February, 1909.

By sec. 71 of the Mining Act of Ontario, 1908, it is provided that no person shall be entitled to enforce any claim, right, or interest contracted for or acquired before the staking out, to or in or under any staking out or recording of a mining claim or of any mining lands or mining rights done in the name of another person, unless the fact that such first mentioned person is so entitled is made to appear by a writing signed by the holder of the claim or by the licensee by whom or in whose name the staking out or recording was done, or the evidence of such first named person is corroborated by some other material evidence, and where a right or interest is so

made to appear, the provisions of the Statute of Frauds shall not apply.

The plaintiff seeks to enforce a right contracted for before the staking out or recording of certain mining claims, and the fact that he is or may be entitled to enforce such right does appear by a writing signed by the holder during his lifetime of the mining claims in question. Section 71 is express that in such a case the Statute of Frauds shall not apply.

It is argued that, as the Mining Act of 1908 did not become law until after the death of Turner—prior to which the rights of the plaintiff, if any, had arisen—sec. 71 can have no application to the present case. That objection would have force if this action had been brought prior to the 15th May, 1908, when the Act came into effect. But sec. 4 of the Statute of Frauds merely prohibits the bringing in certain cases of an action except when evidenced in a certain manner; it does not, like sec. 17 (sec. 12 of the Ontario Act), affect the validity of the contract. If the contract were invalid under sec. 17, an enactment of our Legislature, passed after the contract was made, and stating that the Statute of Frauds did not apply in such cases, would not affect it or any but contracts made after the Ontario Act came into force. But where the statute gives a right to bring an action upon such evidence as appears to exist in this case, and that action is brought after the statute came into force, it is, I think, quite immaterial that the rights sought to be enforced arose prior to the enactment of the statute: Maxwell, 4th ed., pp. 333 to 341.

I consider that if the 4th section of the Statute of Frauds has any application to the right of the plaintiff to maintain this action, that application has been destroyed by sec. 71 of the Ontario Mining Act of 1908.

There will be an order accordingly; costs in the cause.

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## [IN THE COURT OF APPEAL.]

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1909

June 8.

IN RE LEE.

*Revenue—Succession Duty—"Aggregate Value"—Rate of Duty—Statutes—Retrospective Construction.*

Where the deceased died on June 24th, 1904, and the gross value of his estate was over \$200,000, but the net value, after deducting debts, encumbrances, and charges, was under \$100,000:—

*Held*, that the estate was liable to a succession duty at the rate of five per cent. on the net value, under R.S.O. 1897, ch. 24, as amended by 1 Edw. VII. ch. 8, sec. 3; and that the later statute, 5 Edw. VII. ch. 6, under which the duty would only be two per cent., could not be given a retrospective operation, while the statute 7 Edw. VII. ch. 10, notwithstanding sec. 2 thereof, did not apply to the case or affect the matter.

THIS was an appeal by the executors of Arthur Brindley Lee from an order made by Winchester, Judge of the Surrogate Court of the county of York, in certain proceedings concerning the estate taken under the provisions of the Succession Duty Act.

The circumstances of the case are sufficiently stated in the judgment.

The appeal was argued on April 28th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

*E. E. A. DuVernet*, K.C., and *A. H. F. Lefroy*, K.C., for the executors, contended that the Act which applied to the case was the statute of 1907, 7 Edw. VII. ch. 10 (O.), secs. 2, 6 (3), 21;\*

\* 7 Edw. VII. ch. 10 (O.)

1. This Act may be cited as the Succession Duty Act.

2. For the purpose of raising a revenue for provincial purposes, save as is hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty at the graduated rates hereinafter mentioned upon all property which has passed on the death of any person who has died on or since the 1st day of July, 1892, or passing on the death of any person who shall hereafter die. . . .

3. (1) Where the following words and expressions occur in this Act they shall be construed in the manner hereinafter mentioned unless a contrary intention appears:— . . .

(g) The words "aggregate value" as meaning the value of the property after the debts, encumbrances and other allowances authorized by sec. 4 of this Act are deducted therefrom. . . .

6. (1) Save as aforesaid the following property shall be subject to succession duty to be paid for the use of the Province over and above the fees paid under the Surrogate Courts Act. . . .

(3) Where the aggregate value of the property exceeds \$50,000, and any property passes in manner aforesaid . . . to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, son-in-law, or daughter-in-law of the deceased, the same . . . shall be subject to a duty at the rate and on the scale as follows:—

that the deceased in this case, having died since July 1st, 1892, 2 per cent. only was chargeable as succession duty, under sec. 6 (3) (b) of that Act, and that sec. 21 was reconcilable by being construed as referring to cases where persons have not only died before the commencement of the Act, but the amount of duty payable in respect to their estate has been definitely fixed and determined, which it had not been in this case; that if there was an inconsistency between sec. 2 and sec. 21, sec. 2 should govern: *City of Ottawa v. Hunter* (1900), 31 S.C.R. 7; *Alton Wood's Case* (1596), 1 Rep. 68; *Clelland v. Ker* (1843) 6 Ir. Eq. R. 35; *Doe d. Scruton v. Snaitth* (1832), 8 Bing. 146, at p. 152; Am. & Eng. Encyc. of Law, 1st ed., vol. 23, pp. 311, 402, 437; that the Act 6 Edw. VII. ch. 19, sec. 11 (O.), shewed that subsequent amendments were to be read as declaratory of the law since the Act 1 Edw. VII. ch. 8.

G. R. Geary, K.C., for the Provincial Treasurer of Ontario, contended that the Act of 1907 should not be read as applying to this case, which was an old matter at the date of its passing, although the rate chargeable had not come up for discussion; that certain rights had accrued to the Crown; that sec. 2 of the Act of 1907 plainly looks into the future and would apply to persons who had died since July 1st, 1892, leaving life estates and estates in remainder; that, at any rate, sec. 21 must govern, being the last expression of the will of the Legislature; that very strong words would be required to interfere with the vested rights of the Crown under the statute of 1901. He cited *In re Cornwallis* (1856), 11 Exch. 580; *Dominion Iron and Steel Co. v. McDonald* (1904), 37 N.S.R.1; *Attorney-General v. Cameron*

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(a) Where the aggregate value exceeds \$50,000 and does not exceed \$75,000, 1 per cent.;

(b) Exceeds \$75,000 and does not exceed \$100,000, 2 per cent. . . .

(6) Provided that where the aggregate value of the property exceeds \$50,000, and the amount passing in manner aforesaid to any one person mentioned in the next preceding sub-section, except the grandfather, grandmother, father and mother, exceeds the amount hereinafter mentioned a further duty shall be paid on the amount so passing, in addition to the duty in the next preceding sub-section mentioned as follows:—

(a) Where the whole amount so passing to one person exceeds \$50,000, and does not exceed \$100,000, 1 per cent. . . .

21. Except as to the liability for duty of estates of persons dying before the commencement of this Act and as to the amount of duty payable in respect thereof, the Succession Duty Act and amendments thereto are repealed.

C. A. (1896), 27 O.R. 380; Beal on Legal Interpretation, 2nd ed.,  
1909 p. 426.

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June 8. The judgment of the Court was delivered by GARROW, J.A.:—The testator died on June 24th, 1904. His gross estate amounted to \$239,858.74, reduced by statutory deduction for debts, incumbrances, and charges to \$96,188, as fixed by the learned Judge. And upon the latter sum he directed the succession duty to be paid at the rate of five per cent.

It is not claimed that this was not the proper rate if the statute to be applied is the one of 1901, 1 Edw. VII. ch. 8 (O.),\* which amended R.S.O. 1897, ch. 24, but the contention is that the statute of 1905, 5 Edw. VII. ch. 6 (O.), is applicable, under which the rate would be two per cent.

The appellants' contention involves a construction which would give a retrospective effect to the Act of 1905, which it has been said should not be done (except in certain exceptional matters, such as procedure) unless it appears very clearly by the terms of the Act or arises by necessary and distinct interpretation: see *Smith v. Callander*, [1901] A.C. 297, 305; *In re Roden and City of Toronto* (1898), 25 A.R. 12; Maxwell on Statutes, 4th ed., p. 321.

Legislation upon the subject of succession duties in this Province is all comparatively recent, the first Act having only been passed in the year 1892. Under that Act, and, indeed, under all the amendments down to the year 1905, estates of less than \$100,000, descending to children, were wholly untaxed. But the Act of 1901, by introducing a new interpretation for the words "aggregate value," which had been interpreted in *Ross v. The Queen* (1900-1), 32 O.R. 143, 1 O.L.R. 487, to mean the net value, subjected for the first time estates such as this in which, although the net value was under \$100,000, the gross value exceeded that sum, to pay duty, and provided that where the total value

\* 1 Edw. VII. ch. 8, sec. 3 (O.): Section 2 of the Act is amended by adding thereto the following sub-sections:—

(2) The phrase "aggregate value" means the value of the property before any debts or other allowances or exemptions are deducted therefrom.

(3) . . . .

(4)

R.S.O. 1897, ch. 24, sec. 4 (4): Where the aggregate value of the property exceeds \$200,000, the whole property which passes as aforesaid shall be subject to a duty of \$5 for every \$100 of the value.

exceeded \$200,000, the rate should be five per cent., calculated upon what is called the dutiable or net value.

The statute of 1905 was clearly intended to make and did make a very material change. It restored the interpretation of "aggregate value" as defined in *Ross v. The Queen*,\* and lowered the minimum at which estates might descend to children free of duty to \$75,000, instead of \$100,000, as before. But there is not a word in the statute, that I can find, affording any indication that the Legislature intended the operation of the Act to be otherwise than the usual one of prospective rather than retrospective. What is argued, among other things, is that the new Act repealed sec. 4 of the principal Act, R.S.O. 1897, ch. 24, as amended, and substituted a new section, with a lower rate,† without providing a saving clause as to pending matters. But that was unnecessary by virtue of clause 46 (c) (e) of sec. 7 of the Interpretation Act, 7 Edw. VII. ch. 2‡. The duty is a debt owing

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\* 5 Edw. VII. ch. 6, sec. 3 (O.): Section 2 of the principal Act as amended by sec. 3 of the Act passed in the first year of His Majesty's reign, chapter 8, is repealed and the following substituted therefor:—

2 (1) (a). . . .

(b) . . . .

(2) The phrase "aggregate value" means the value of the property after the debts, encumbrances, or other allowances authorized by sub-sec. 4 of this section are deducted therefrom. . . .

† 5 Edw. VII. ch. 6, sec. 8 (O.): Section 4 of the principal Act as amended . . . (is) repealed, and the following substituted therefor.

4. (1) . . . .

(2) . . . .

(3) Where the aggregate value of the property of the deceased exceeds \$50,000, and passes in manner aforesaid . . . to or for the benefit of the father, mother, husband, wife, child, son-in-law, or daughter-in-law of the deceased, the same . . . shall be subject to a duty at the rate and on the scale as follows:—

(a) When the said aggregate value exceeds \$50,000 and does not exceed \$75,000, 1 per cent.

(b) Exceeds \$75,000 and does not exceed \$100,000, 2 per cent. . . .

‡ 7 Edw. VII. ch. 2, sec. 7 (46) (O.):—

46. Where any Act or enactment is repealed, or where any regulation is revoked, such repeal or revocation shall not save as in this section otherwise provided—

(a) . . . .

(b) . . . .

(c) Affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked; or .

(d) . . . .

(e) Affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

And any such investigation, legal proceeding or remedy may be insti-



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to the Crown as of the date of the death of the testator, although payment need not be made for 18 months, during which interest is not to be charged. The debt as of the date of the death, it will be admitted, ought not to be subsequently increased by mere construction, and an argument against its increase by construction ought to be equally potent to prevent its decrease, except upon explicit language. There is nothing, in my opinion, to prevent giving full effect to the statute of 1905, by applying it only to the estates of those dying after it was passed, and there is equally no difficulty in applying the law as it stood prior to the passing of that Act to the estates of persons who were then dead. And that, I feel certain, was, under all the circumstances, the intention of the Legislature.

Mr. Lefroy, of counsel for the appellants, referred to the Act of 1906, 6 Edw. VII. ch. 19, sec. 11,\* by which solicitors' fees are excluded from the surrogate fees allowed to be deducted, and to the fact that this amendment was thereby made declaratory of the law since the passing of 1 Edw. VII. ch. 8. But this, if it has any bearing, must be against rather than for the appellants' contention, for *expressio unius est exclusio alterius*.

For these reasons I think the order should be affirmed and the appeal dismissed with costs.

A. H. F. L.

tuted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the Act, enactment, regulation or thing had not been repealed or revoked.

\* 6 Edw. VII. ch. 19, sec. 11 (O.):—

(1) Section 2 of the Succession Duty Act, as amended by the Act passed in the 5th year of His Majesty's reign, ch. 6, sec. 3, is amended by inserting after the word "fees" in the third line of sub-sec. 4, clause (d), the words "or for solicitor's fees," and adding to the end of such clause the words "The term 'surrogate fees' shall not include solicitor's fees." This amendment shall be deemed to be declaratory of the law since the passing of the Act in the first year of His Majesty's reign, chaptered 8.

(2) . . .

[BOYD, C.]

## McKECHNIE V. GRAND ORANGE LODGE OF BRITISH AMERICA.

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Feb. 4.

*Life Insurance—Fraternal Society—Mutual Benefit Fund—Payment of Assessment—Rules of Society—Membership in Good Standing in Primary Lodge—Proofs of Claim for Death Benefit—Refusal of Certificate of Good Standing—Resort to Domestic Tribunals—R.S.O. 1897, ch. 203, sec. 165 (1)—Repayment of Assessments.*

A certificate of membership issued to McK. in 1889 by the Orange Mutual Insurance Society of Ontario West set forth that he was a member of a certain (primary) Orange Lodge, a member in good standing of the Loyal Orange Association of British America and of the insurance society. He undertook to pay all assessments to the insurance society, and to comply with all laws then or thereafter to be in force; and payment of the insurance was conditioned on proof being made of his good standing, at the time of his death, in the association and the insurance society. The defendants were incorporated by 53 Vict. ch. 105 (D.), and established a benefit fund, and took over the certificates of insurance theretofore issued by the insurance society, and assumed liability therefor. The proofs of death prescribed required that there be a certificate of the primary Lodge that the deceased was a member thereof in good standing at the time of his death.

McK., being in arrear for dues to his primary Lodge, was suspended in 1891 or 1892; in 1896 he applied for reinstatement, but did not pay his arrears; his name never appeared again upon the membership roll of his primary Lodge, and nothing more was heard of him by that Lodge until his death occurred in 1907, when an application was made for a certificate of good standing, which was refused. The annual assessments made by the defendants for the benefit fund had been paid on his behalf by one to whom his certificate had been pledged. The constitution and laws of the defendants and the benefit fund rules were strict in requiring membership in good standing in some primary Lodge to be shewn as a condition of the payment of the insurance benefit; one of the benefit fund rules provided that no member should be entitled to bring an action until he had exhausted all the remedies provided for in the rules by appeal or otherwise; and another rule provided that the members of the mutual benefit society who were in good standing on the 1st January, 1893, should be held to be members in good standing in the defendants' benefit fund on that day:—

*Held*, that if the old rules and the action as to suspension thereunder were to be regarded as governing the deceased, he was not in good standing on the 1st January, 1893, and his good standing was never effectually restored thereafter; and if he was to be regarded as under the new rules (the two sets being worked cumulatively), he was not in good standing at his death. The certificate of good standing being withheld, there was no proof of claim. The primary Lodge not being before the Court, there could be no adjudication as to the *bona fides* of the withholding of the certificate; and it was questionable whether an action could be maintained if an appeal or other remedy had not been resorted to, under the rules.

The provision of sec. 165 (1) of the Insurance Act, R.S.O. 1897, ch. 203, does not apply to a case where the payment of monthly dues is fixed by the by-laws, and the dues are collected at the regular meetings; and the original of that provision was not in force when the suspension was declared in 1891 or 1892.

And an action to recover the amount of the insurance was dismissed, but without prejudice to any claim for repayment of the assessments.

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ACTION to recover the sum of \$1,000, upon a policy of life insurance or certificate of membership issued by the defendants in favour of Alexander McKechnie, deceased, in the circumstances set forth in the judgment.

The action was tried before BOYD, C., without a jury, at Toronto, on the 25th January, 1909.

*D. Urquhart*, for the plaintiff.

*J. A. Worrell*, K.C., for the defendants.

February 4.\* BOYD, C.:—The “certificate of membership” under which McKechnie obtained this insurance was pursuant to his application of the 31st July, 1889, and sets forth that he is of Loyal Orange Lodge No. 762, held in London, and is a member in good standing of the Loyal Orange Association of British America and in the Orange Mutual Insurance Society of Ontario West. He undertakes to pay all assessments to the said society, and to comply with all laws now or hereafter to be in force; and payment of the insurance is conditioned on proof being made of his good standing in the Loyal Orange Association and in this society, *i.e.*, the mutual insurance one (at the time of his death).

Proof was made of payment of the annual assessment fee to O. L. Benefit Fund of \$7.88 in the year of his death, *i.e.*, in July, 1907.

The defendants were incorporated in 1890 (53 Vict. ch. 105), and established a benefit fund, and took over the certificates of insurance theretofore issued by the Orange Mutual Insurance Society of Ontario West, and assumed liability therefor, under the corporate name of the Grand Orange Lodge of British America.

The proofs of death to be furnished require that there be a certificate of the primary Lodge that the deceased was a member in good standing, at the time of his death, of the Lodge, and also a statutory declaration to the same effect by the financial secretary or treasurer of the Lodge. Neither of these was furnished, because, it is alleged, the deceased McKechnie had been suspended, had failed for many years to pay his monthly dues to the Lodge, and had ceased to be a member in good standing in the primary Lodge and in the Grand Orange Lodge of British America.

\* The publication of this case was delayed pending an appeal. The appeal was not heard owing to a settlement being arranged between the parties.

The insurance or benefit fund department of the defendants can only ascertain by reference to the Lodge at London whether the person insured has continued to be and is a member in good standing, and can only act according to the rules and practice upon the proper certificate and declaration to that effect. The opinion given by the secretary of the insurance department to the head of the London Lodge, on being informed of the facts, was this: "If, as you state, the late A. McKechnie has not been at a meeting in your Lodge for the last 9 or 10 years, and has not kept his dues paid up therein, he could not be in good standing at the time of his death." "One of the principal reasons for the organisation of this fund," he proceeds, "is to keep insured members continually in good standing and in close touch with their primary Lodge."

I will now note the important dates as far as can be traced: 1889, June 20, he entered the body; 1889, July 31, he applied for and obtained certificate of insurance; 1890, April, incorporation of the body; his address, at first London, is changed to Milton in the roll of members of this year; 1891, his address is changed to Rocky Saugeen P.O.; and in 1891 or 1892, February, he is marked in the roll as "suspended;" 1893, January, his name is entered and address, Merton P.O.; and so in 1894; 1895, he is on the roll, and is in arrear as to payment of dues; 1896, his name is on the roll with \$5.40 arrears in January, which has increased in October to \$6.75.

It is now important to observe that, being suspended, he makes a new application to be reinstated in membership in the Grand Orange Lodge of British America Benefit Fund, and signs an agreement that the rules of the Benefit Fund shall form the basis of his application, and also that any neglect to pay any dues, fines, taxes, or assessments, within the time provided by the said constitution and laws, or any suspension from the Loyal Orange Association, shall void the contract, and forfeit all rights thereunder. No new certificate was actually issued to him, but he underwent a new medical examination requisite in order to be reinstated after suspension.

This action of the deceased and of the society proceeded, so far as I can discover from the papers before me, upon certain resolutions of the Lodge. First, on the 9th August, 1894, it

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was resolved that all suspended members (he then being one) be reinstated on payment of \$1, on condition that they remain in the Lodge for twelve months, and if they demand their certificates, they will have to pay all back dues, except leaving the city (*sic*). And on the 13th June, 1895, it was resolved that all members six months in arrear be summoned to attend the meeting on the 11th July. At the time of that meeting McKechnie was in arrear \$5.40 as of January, 1896. Being reinstated on his application of the 25th July, 1896, he does not pay the arrears, which increased to \$6.75 in October.

In 1897 his name does not appear on the roll of membership: 35 other names do appear as the members of the Lodge. This disappearance is explained by the fact that in the yearly returns made by the Lodge to the superior (district?) Lodge for the year ending December, 1896, his name appears as H. McKechnie (clearly a clerical error for A.) as being suspended by the primary Lodge.

Not again does his name appear in the records of the society, and nothing more, apparently, is heard of him by this Lodge till the application is made for the certificate of good standing after his death.

I would take it that the real date of his suspension goes back to 1891 or 1892; that such suspension was recognised by the deceased when he applied for reinstatement; but that his application was not consummated by a certificate, for he made default in paying the arrears, and so continued till his death.

In the by-laws of the Forest City Loyal Orange Benefit Lodge No. 762, which were in force when McKechnie first obtained his certificate of insurance in July, 1889 (see the edition issued in 1886, No. 3, p. 6), it is laid down: "And should any member of this Lodge leave the city, he shall notify the Lodge of his removal, and the said member may still be a member of this Lodge on keeping up his dues and not being more than three months in arrears." And rule 6 says: "Any member who has been suspended shall on no account be entitled to any benefits within two months after he shall be reinstated." I find no explanation in these as to how suspension is effected, and I would infer that the mere absence by removal and the failure to make payment of the dues for three months would be treated, as it appears to have been treated by the Lodge, as operating a suspension.

The constitutional changes wrought by incorporation began after the Dominion statute 53 Vict. ch. 105 was passed on the 24th April, 1890. The transfer of this insurance department from the local Lodge to the corporation was in February, 1893. A new constitution and new laws of the Loyal Orange Association of British America was issued, of which the earliest imprint before me is dated 1895. Under "Duties of Primary Lodges" (of which No. 762 is one) it is provided that "the financial secretary shall prepare and present at the meetings in March, June, September, and December, a complete list of those in arrears:" No. 98, p. 35. Rule 196 provides that "suspension or expulsion may take place for a violation of obligation or of the constitution and laws." Rule 150: "Any member remaining in default for six months after payment has been demanded may be suspended until dues are paid:" p. 48. Rule 162½ (p. 59) provides "that one who has been suspended from the Association may apply to the Lodge in which the case was first investigated, and, should such Lodge deem the applicant worthy and the cause of suspension removed, it may apply to the higher Lodge to have him reinstated, and, sanction having been obtained, he shall be reinstated."

Again, in the Benefit Fund rules issued in 1895, No. 2 declares that the object is to establish a benefit fund from which, on satisfactory evidence of the death of a member who has complied with all its lawful requirements, a sum . . . shall be paid, etc. No. 3 declares that "the membership of the Benefit Fund shall hereafter be composed exclusively of brethren . . . who are members in good standing of some primary Lodge." No. 4: "Should a member of the Benefit Fund be suspended from his primary Lodge for any cause . . . he shall cease to be a member of the Benefit Fund, and in case of his death his representatives shall not be entitled to any benefits from the Fund." No. 6: "The insurance benefit payable on the death of a member who was in good standing at the date of his death shall be \$1,000," etc. No. 8: "The term 'good standing' signifies that the member is not suspended . . . and that he has paid within the prescribed time all . . . his dues," etc. No. 9: "A member not in good standing loses all his rights and claims upon the Benefit Fund, of whatever kind and nature, and can only regain them when reinstated according to the rules of the Benefit Fund."

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No. 10: "Upon satisfactory proof of the death of a member of this Benefit Fund who at the time of his death was in good standing, his representatives shall receive . . . a sum not to exceed \$1,000 . . . according to the terms of his membership." No. 43: "No member shall be entitled to bring an action or other legal proceeding against the Benefit Fund till he has exhausted all the remedies provided for in the rules of the Benefit Fund by appeal or otherwise." No. 55 provides that the members of the Orange Mutual Benefit Society of Ontario West who were in good standing in that society on the 1st day of January, 1893, shall be held to be members in good standing in this Benefit Fund on that day, and the certificates of membership now held by them shall be acknowledged by this Benefit Fund to the same extent and subject to the rules of this Benefit Fund, in the same manner as if such certificates had been issued by this Benefit Fund. No. 56 provides that a member who changes his place of residence shall notify previously the secretary of the Benefit Fund . . . the member so removing must also continue in active membership with the Orange Lodge of which he has been a member, or within 90 days from change of residence become connected with an Orange Lodge working under a Grand Lodge recognised, etc.

If the old rules and the action as to suspension thereunder are to be regarded as governing the deceased, then he was not, under rule 55, in good standing on the 1st day of January, 1893, and his good standing was never effectually restored thereafter.

If he is also to be regarded as under the new rules (which I think is the case, and that the two sets of rules may be worked cumulatively), then he was clearly not in good standing at the time of his death. If technically he was not suspended by the action of the Lodge in 1896, he has been for years in default in respect of his dues which are still unpaid; and he has also made default in violating the regulations imposed upon members to secure their presence and co-operative activity in the local Lodge. He has been an absentee from the local Lodge, and has not transferred himself to another for over ten years. It appears strange that the yearly assessments have been paid to the Benefit Fund till the year of his death—that was explained during the trial by the fact that the certificate was pledged to some one who kept up the payment of the assessments.

But, looking at the whole scheme of the Orange body in this regard of insurance, one must not forget the system of dual membership, which is of its essence. The benefit fund is not gathered for the insurance of everybody who applies, but for those who begin and continue and at death are proved to be members in good standing of a private Lodge. This is a requirement quite apart from good standing in the insurance department, which is secured by punctual payment of the assessments.

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It was explained during the evidence that cheap insurance of this kind can only be successfully furnished by means of the primary Lodges keeping their members and fostering fraternal feeling and attracting others to their companionship in the Order, and so enlarging the constituency from which the financial supplies come.

All these duties were neglected by the deceased, and he also failed in meeting the monthly dues, and he had practically withdrawn himself from membership. I do not further elaborate the many difficulties in the way of this litigation. One cannot blame the primary Lodge for refusing to certify his good standing, and, in the absence of that certificate, *bonâ fide* withheld, there can be no proof of claim in its legal aspect. No judgment of this Court can reach that primary body in its absence from the record, and it is a grave question whether litigation can be maintained, even in a more meritorious case, if an appeal or other resort has not been made to the local Lodge, as contemplated by the rules.

I may mention that I do not think the provision cited of the Insurance Act, R.S.O. 1897, ch. 203, sec. 165 (1),\* applies to a case like this, where the payment of monthly dues is fixed by the by-laws, and the dues are collected at the regularly appointed meetings, as appears by the rules of the Lodge: see *Cunningham's Case* (1898), 29 O.R. 708. *Wintemute v. Brotherhood of Railroad Trainmen* (1900), 27 A.R. 524, would indicate that the section does not apply to this Benefit Fund. And *quare*, was the original

\* 165.—(1) No forfeiture or suspension shall be incurred by any member of a friendly society, or person insured therein, by reason of any default in paying any contributions or assessment, except such as are payable at fixed dates, until after notice to the member stating the amount due by him, and apprising him that in case of default of payment by him within a reasonable time . . . his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice. . . .



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of the Act in force when the suspension was declared in 1891 or 1892. The month was February, and the Act was first passed on the 14th April, 1892.

The facts in *Dale v. Weston Lodge* (1897), 24 A.R. 351, are widely distinguishable from those now in hand.

The action must be dismissed, and, I suppose, with costs, if asked for. Under rule No. 9, before mentioned, I do not now see my way to direct the repayment of any or all of the assessments paid by or for the deceased—but the dismissal of the action may be without prejudice to that claim.

E. B. B.

## [IN THE COURT OF APPEAL.]

STANFORD V. IMPERIAL GUARANTEE AND ACCIDENT INSURANCE  
CO. OF CANADA.

C. A.

1908

Dec. 19.

1909

May 5.

*Accident Insurance—Commercial Traveller—Brakesman—Temporary Engagement in a more Hazardous Employment—Condition—Amount Payable.*

A policy of accident insurance described the insured as a commercial traveller, and contained a condition that if he met with an accident while "temporarily or permanently engaged in any occupation . . . classed by the company as more hazardous than that in which he is insured," the amount payable should be what the premiums paid by him would entitle him to be insured for under such more dangerous classification. The insured applied for employment as a railway brakesman, and while taking the usual trial trip prior to engagement (in which, however, he worked gratuitously as a brakesman), he was killed, apparently by being run over by a train:—*Held*, that the case fell within the above condition, and the amount payable was limited accordingly.

*McNevin v. Canadian Railway Accident Insurance Co.* (1900-2), 32 O.R. 284, 2 O.L.R. 531, 32 S.C.R. 194, considered and distinguished.  
Judgment of Clute, J., reversed.

ACTION upon a policy of accident insurance, tried before CLUTE, J., without a jury, at Toronto, on December 16th and 17th, 1908.

*Charles Elliott*, for the plaintiff.

*E. B. Ryckman*, K.C., and *C. W. Kerr*, for the defendants.

December 19. CLUTE, J.:—The plaintiff brings this action, as widow and beneficiary of the late Charles Finger Stanford, on an accident policy, dated January 3rd, 1907. The deceased husband was insured as a traveller. In the application, the statements of which the insured warrants to be true, he describes his occupation

as that of "traveller," and in clause 5 of the policy it is provided "that if the assured meet with an accident while temporarily or permanently engaged in any occupation or exposure to danger classed by the company as more hazardous than that in which he is insured (or approximating thereto, if not mentioned in the company's schedule of risks), the sums payable under this policy shall be such proportion of the sums herein named as the premiums paid by the insured would entitle him to be insured for under such more dangerous classification." There is a claim for double liability, which was abandoned at the trial.

The defendants by their defence allege that the insured ceased to be a commercial traveller without notifying the defendants, and at the time of the alleged accident the insured was either temporarily or permanently engaged in the occupation of a brakesman, and was travelling on a freight train, thereby exposing himself to danger classed by the company as more hazardous than that in which he was insured, and assert that the plaintiff is not entitled to more insurance than the insured could have obtained by paying a premium of \$8 for freight brakesman, under their classification "special contract." This sum, amounting to \$240.97, was tendered before action and refused. The defendants, without admitting liability, have paid into Court the sum of \$337.35, in satisfaction of the plaintiff's cause of action.

The facts of the case I find to be as follows:—

The occupation of the deceased husband at the time the policy was obtained was that of traveller or agent for the Poole Publishing Co., obtaining advertisements and orders for a directory. He continued in this employment until May, 1907, when he was laid off by the company, with the assurance that he would be taken on in the course of a few weeks. The Canada Publishing Co. were interested with the Poole Publishing Co. in the publication of the directory, and it was expected that the affairs of the Poole Publishing Co. would be in some way adjusted so that he might continue his work. The Poole Publishing Co., however, made an assignment, and up to the time of the accident he was not taken back. He continued without work from May until the date of the accident, expecting to be re-engaged in his old employment.

A friend of the deceased, a brakesman on the Grand Trunk railway, suggested to him that he might get a position as brakesman.

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The friend applied to the general yardmaster of the Grand Trunk railway at York, in November, 1907. The practice when engaging a person who seeks to become a brakeman is described by the general yardmaster to be as follows. His engagement does not take place until the applicant has made two trial trips. For this purpose he is placed under the direction of the conductor in charge of the train, whose duty it is to give him instructions on the trip, and, if his report is favourable, the applicant is then to present himself, furnished with an outfit, consisting of a watch of a particular make, and some other things. The trial trip is to be at his own expense and his own risk. The deceased, desiring to be allowed to go out on a trial trip, received an order or warrant from the yardmaster, which he presented, on a morning in November, to the conductor of the way-freight between York and Belleville, and was received on the train by the conductor for the purpose of making the trial trip. The train had a full complement of men exclusive of the deceased. He was not obliged to do any work upon this trip, although it was usual for applicants to assist in loading and unloading the cars. The deceased did assist in loading and unloading the cars at Pickering and also at Oshawa. After the train had reached Bowmanville, and was taking the siding to discharge and receive freight, the conductor went to the station to report, and while he was away the accident occurred. The only witness who saw the accident—a brakeman—has since died. The deceased was left in the caboose when the conductor started for the station. He was found a few minutes afterwards near the track with his head crushed. He had no occasion to go on top of the cars, and it is not suggested that he did. The brakes were operated from the engine, and there was a brakeman there for the purpose. The evidence is, and I find as a fact, that he had nothing to do with the operation of the train at the particular time that he received the injuries from which he died. From the surrounding circumstances it would appear, and I find as a fact, that he received his injuries which caused his death by being run over by the train, probably slipping from the steps as he got off, or on alighting.

I find that the regular occupation of the deceased at the time of his death was that of traveller; that he had not yet been engaged in any other occupation; that his application to the railway company had not been accepted; that he was not in the employ of the

railway company at the time of his death, nor had been, nor had he engaged in any other occupation than that of traveller. Had his trial trips been favourably reported upon, he might or might not have been engaged.

The plaintiff relies chiefly on *McNevin v. Canadian Railway Accident Insurance Co.* (1900-2), 32 O.R. 284, 2 O.L.R. 521, 32 S.C.R. 194.

The defendants contend that the above clause in the policy sufficiently distinguishes this case from the *McNevin* case. The clause in the *McNevin* case was as follows: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." In the company's classification of rates brakemen are classed "as special contract." The company would only insure in that case to the extent of \$500, and the premium is \$27, whereas a commercial traveller or agent is in the select class, and the rate is \$4 per \$1,000—\$4 being added in the present to cover the risk in respect of certain diseases which are specified.

The question is, then, whether the facts in this case bring into operation clause 5 above quoted. It will be seen that the clause is not identical with that in the *McNevin* case. There the operative words are, "if the insured is injured in any occupation or exposure," etc. In the present policy it is provided that "if the insured meet with an accident while temporarily or permanently engaged in any occupation or exposure," etc. The words added here are "temporarily or permanently engaged." In the *McNevin* case the Chief Justice of the Queen's Bench said: "I would read 'occupation' as meaning occupation or employment as a usual business, not as a casual or isolated act, or series of casual acts in the intervals of ordinary employment;" and a number of authorities are there cited in the Court below for this view. The Court of Appeal, while differing upon another point, were unanimous in holding that the words "occupation or exposure," used in the policy, referred to something of a permanent nature, and that the doing of an isolated act of a more hazardous character did not change the insured's class or entitle the assurers to reduce the amount recoverable. Osler, J.A., said: "Do these words 'occupation or exposure'

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relate to a change of employment or occupation, during which new or changed occupation the injury happens, or to the particular act which causes it as being one pertaining to a different occupation from that stated in the application? In other words, are the clauses intended, as the defendants say they are, to meet the case of an injury caused by any isolated act which may pertain to any different employment; or, which is the plaintiff's contention, do they refer to an entire change of occupation or employment and an injury occurring in any manner (not specially expected) during the period of the latter? . . . On the whole, I am of opinion that the construction argued for by the plaintiff is the right one, and that she is entitled to recover the whole sum insured unless defeated by some other provision of the policy." Moss, J.A., said: "It seems plain that the occupation or exposure there spoken of does not mean merely an isolated act or the temporary doing of something not in the line of the occupation held when the insurance is effected. It means a permanent change to an occupation or exposure of a kind classed as more hazardous. From that time there is also a permanent change in the condition of the policy as regards the amount payable thereunder."

It is here pointed out that the word "temporarily" is introduced in the present policy, and that upon that ground the clause in this policy is distinguishable from that in the *McNevin* case. I do not think the word "temporarily" has that effect. Having regard to the construction placed upon the clause in the *McNevin* case, I am of opinion that the word "temporarily" simply enlarges the scope of the clause, in so far as to cover a case where a person has in fact an engagement in a business which is regarded as more hazardous, although that engagement is only temporary; that it does not change the scope of the clause to the extent that it covers a case where, though a person is not engaged, he is in fact discharging duties which he might discharge if engaged either temporarily or permanently. In short, that the words refer to the nature of the occupation as belonging to a particular class, and not to the particular act that may be done by a person not engaged in that occupation, although the act might be the same as if he were. I am, therefore, of opinion that the *McNevin* case, in so far as this part of the clause is concerned, governs.

It is further contended, however, that the words in the clause,

"or approximating thereto if not mentioned in the company's schedule of risks," preclude the plaintiff from recovery. These words, however, have relation to the occupation in which the insured may be engaged, and not to any particular isolated acts which he may do irrespective of his occupation. If, for instance, the deceased had become engaged in some occupation which, although it could not be described as brakesman, yet carried with it the risk approximating to that of brakesman, he would come within the class of brakesman, and so within the clause. Here the acts which he did were in fact acts which a brakesman would do. If I am right in thinking that doing a brakesman's work does not preclude recovery, it cannot, I think, be successfully contended that the words quoted have that effect. It may also be mentioned here that, as pointed out in the *McNevin* case, R.S.O. 1897, ch. 203, sec. 153, sub-sec. 1, provides that where the event has happened on the occurrence of which the insurance is payable, the maximum amount named in the contract shall *primâ facie* be payable, and it shall lie on the insurer to prove to the contrary.

The defence relied very strongly upon the case of *Thomas v. Masons' Fraternal Accident Association of America* (1901), 71 N.Y. Supp. 692. There the clause is almost identical with that in the *McNevin* case, but the facts were different. In the *Thomas* case, it appeared that the assured was an attorney, and was so classed. It appeared also that a hunter for pleasure or profit was also classified in No. 6, and for death received while so engaged the defendant was liable to pay only \$1,000 instead of \$5,000. The Court of Appeals there held, reversing the decision of the trial Judge, that the plaintiff was not entitled to recover the \$5,000, but only the sum of \$1,000, because when Thomas was killed he was engaged in hunting for pleasure, and the amount of his indemnity in such a case was, by the express terms of the policy, limited to that sum. On the facts the case is clearly, I think, distinguishable. There were numerous American authorities cited by both counsel, which, taking the view I do, it is unnecessary here to review.

In my opinion, the plaintiff is entitled to recover the full amount of the policy, with costs of action.

The defendants appealed (by special leave) to the Court of Appeal, and the appeal was argued on February 4th and 5th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

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*E. B. Ryckman*, K.C., for the appellants, contended that the case of *McNevin v. Canadian Railway Accident Insurance Co.*, 2 O.L.R. 521, 32 S.C.R. 194, was distinguishable on the ground that what was done there was a really isolated act: *Etna Life Insurance Co. v. Dunn* (1905), 138 Fed. 629; *Thomas v. Masons Fraternal Accident Association of America*, 71 N.Y. Supp. 692.

*Charles Elliott*, for the respondent, contended that the finding that the insured had never become a brakeman was correct on the facts. He relied on the *McNevin* case, *supra*.

*Ryckman*, in reply.

May 5. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants from the judgment at the trial, of Clute, J., in favour of the plaintiff.

The action was brought to recover \$2,000 secured by an accident insurance policy for that sum issued by the defendants upon the plaintiff's late husband, one Charles Finger Stanford, who was killed at Bowmanville by a train of the Grand Trunk Railway Co. And the plaintiff claimed under a special term of the policy an additional sum of \$2,000, because, as was alleged, the deceased was killed while riding as a passenger on the train, which latter claim, however, was not allowed, and judgment was given for the first mentioned sum and interest.

When the insurance was effected, the deceased was described as a commercial traveller, but he ceased to be a commercial traveller in the month of May next before his death, and was out of employment until the day of the accident. A day or two before he applied for employment as brakeman on the railway, and was making his first trip in that capacity when he was killed. The company's practice is to permit applicants for such employment to make one or more trial trips before actual employment takes place. There are different classifications of risks in use by the defendants in their business. Commercial travellers are in a class called "select," and pay at a rate of \$4 per thousand of insurance, while brakemen are in a class called "special contract," and pay at a rate of \$27 per thousand, and will only be insured up to \$500.

The defendants do not contend that the plaintiff's whole claim should be defeated, but that it should be reduced to such sum as would have been paid to a brakeman for the premium which

was paid, for which contention they rely on the fifth condition, which reads as follows: "That if the insured meet with an accident while temporarily or permanently engaged in any occupation or exposure to danger classed by the company as more hazardous than that in which he is insured, or approximating thereto, if not mentioned in the company's schedule of risks, the sums payable under this policy shall be such proportion of the sums herein named as the premiums paid by the insured would entitle him to be insured for under such more dangerous classification." And, in my opinion, this contention, which is apparently fair and just, and in accordance with the proper construction of the contract, ought to prevail.

Clute, J., was evidently of the opinion that the case fell within the authority of *McNevin v. Canadian Railway Accident Insurance Co.*, 2 O.L.R. 521, and 32 S.C.R. 194, where the corresponding condition was as follows: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

But there is, I think, an apparent and, indeed, vital difference between the language of the two conditions by the insertion in the former of the words "temporarily or permanently," for no one can read the judgments in the *McNevin* case without seeing that the result really rested upon this, that the "occupation" in the condition in that case was held to mean an occupation of a more or less permanent character, and that the mere doing of an isolated act properly belonging to another and more hazardous occupation would not prevent recovery.

Clute, J., upon this distinction being pointed out, held that the mere use of the word "temporarily" did not affect the matter, that the use of that word only enlarged the scope of the clause in so far as to cover the case of a person in fact having an engagement in a more hazardous business, although such employment was only temporary, but did not cover the case of a person who although not engaged was in fact discharging the duties of the more hazardous employment. This seems to make the result depend upon the meaning of the word "engaged," which Clute, J., evidently treated as the equivalent of "hired" or "employed."

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The important words are, "temporarily or permanently engaged in any occupation or exposure to danger." We were told upon the argument that the word "temporarily" was inserted expressly to meet the *McNevin* case, the form having been prepared after that decision, which seems probable, although unimportant; but words have an unfortunate habit of sometimes miscarrying the intended meaning. The object of the conditions is, I think, plain, namely, to provide against a liability not contracted for and not paid for—a perfectly proper object. And, if the language of the document will reasonably permit the accomplishment of that object, there ought to be no objections to its success.

The contract was, of course, prepared by the defendants. Its language is their language, and if it is ambiguous, or if there is a real doubt about what its true meaning is, the doubt should be resolved favourably to the other party to the contract. But we are not justified in "creating a doubt or magnifying an ambiguity when the circumstances of the case raise no real difficulty:" *per* Lindley, L.J., in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453, at p. 456. "Engage" is a word of various meaning, depending on the circumstances in which it is found, and, therefore, to that extent, ambiguous. But it does not necessarily mean a hiring or contract of any kind. One of its meanings, given in the *Century Dictionary*, is "to occupy one's self; be busied; take part, as to engage in conversation; he is zealously engaged in the cause;" and this, in my opinion, is the more reasonable and proper meaning to ascribe to it in this contract. The thing intended to be provided against was not contracting to do—there being no danger in a mere contract—but actually doing the dangerous thing. The condition would certainly not have been broken by merely entering into a contract to become a brakesman, unless that was followed by the assured actually doing the work of a brakesman. And if he was actually doing the work of a brakesman when injured, it is, in my opinion, a matter of no moment whether he had or had not at the time a permanent or even a temporary contract with the railway company. I am further of the opinion that the deceased was at least temporarily "engaged" within the meaning of the term, even as understood by Clute, J. He had applied to become a brakesman, and he was spending his first day in that employment, in, as the evidence shews, the usual course or practice with a be-

ginner. He was there by the consent of the railway company to learn how to become a brakesman, and the evidence shews that he was actually discharging the duties of a brakesman upon the trip. Thomas T. Smith, a brakesman on the same train, said of the deceased, in his evidence:—

“Q. What was he doing on the train? A. He tried to follow up the ordinary work we done.

“Q. Did you see him handling freight? A. Yes.

“Q. Where? A. Pickering and Oshawa.

“Q. That is, loading and unloading? A. Yes.”

Henry Doyle, the conductor on the trip, said that when the deceased came to the train he asked how long the trip would be, and on being told two days said he was provided with food in his lunch basket for that period. He also shewed Doyle his order from the yardmaster allowing him to go on the trial trip as a brakesman, which order said “to take Mr. Stanford out on trial trip as brakesman at his own risk and expense, and report to me on arrival as to his capability as brakesman.” The evidence further shews that it is usual for a beginner to make two trips by way of trial, and as each trip apparently occupied two days, this would mean four days’ apprenticeship, after which, if found satisfactory, the apprentice would be hired as a brakesman. And while making the trial trips the apprentice, although paid no wages, was, as the evidence shews, under the orders of the conductor, just as were the other brakesmen.

Upon the whole I entertain no doubt that the *McNevin* case, so much relied on, does not apply, and that upon the proper construction of the contract the plaintiff is only entitled to recover such sum as what was paid by way of premium would have secured as indemnity to one following the occupation for the time being of brakesman, which sum appears to be fully covered by the sum of \$337.35, paid into Court; and that to that extent the appeal should be allowed with costs. And the plaintiff must pay the costs of the action subsequent to the payment into Court.

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## [IN THE COURT OF APPEAL.]

IN RE. MANES TAILORING COMPANY, LIMITED.

CRAWFORD'S CASE.

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April 5.

*Company—Directors Allotting themselves Shares as Fully Paid up—Mise-  
feasance—Winding-up Act, R.S.C. 1906, ch. 144, sec. 123.*

An original subscriber and provisional director of a company who had only paid \$25 on account joined with the other provisional directors in passing a resolution, at the organization meeting of the company in 1902, that the shares of capital stock subscribed for by them should be allotted to them as fully paid up, which was done. In 1904 he transferred his shares, receiving therefor the sum of \$125 more than he had paid. In 1906 the shares were forfeited, by resolution of the directors, for non-payment of a call of 100 per cent. made upon them.

*Held*, in winding-up proceedings (MEREDITH, J.A., dissenting as to the measure of damages), that the original subscriber for the shares was liable as for breach of trust under sec. 123 of the Winding-up Act, R.S.C. 1906, ch. 144, in assuming to accept the shares as fully paid up; but the measure of damages was the market value of the shares at the date of the allotment, and the sum of \$125 was all that he was liable for in this proceeding.

*Per MEREDITH, J.A.*:—The measure of damages was the par value of the shares.

Judgment of TEETZEL, J., affirmed.

THIS was an appeal by the liquidator of the Manes Tailoring Co., Limited, from the judgment of TEETZEL, J., delivered February 28th, 1908, varying the judgment of an Official Referee dated February 3rd, 1908, so far as the same related to the respondent Thomas Crawford, by reducing the liability of the said Crawford to the said liquidator to the sum of \$125, exclusive of costs.

The evidence was taken before the Official Referee on October 10th, 1907.

*Joseph Montgomery*, for the liquidator.

*J. D. Montgomery*, for Thomas Crawford.

*Eric N. Armour*, for Spence.

February 3. JAMES S. CARTWRIGHT, Official Referee:—The liquidator makes a claim against the three surviving directors for alleged misfeasance.

The company was incorporated on November 19th, 1902, the persons above named being among the original incorporators. They each subscribed for 300 shares of \$10 each, and Mrs. Spence also subscribed for 100 shares.

The company was organized on November 27th, 1902. The five incorporators were named provisional directors. At the first meeting the number was fixed at four, and Messrs. Manes, Spence,

and Crawford, and the late Mr. St. John, were elected. The same day those directors elected Mr. Crawford to be president, Mr. Spence as vice-president, and Mr. Manes as manager and treasurer. At the same meeting it was moved by Mr. Manes and seconded by Mr. Spence and carried, that the 1,300 shares of common stock subscribed for by the five original incorporators should be "allotted to each as fully paid-up common stock or shares of the company." And, on March 17th, 1903, certificates to this effect were issued accordingly, and they were always dealt with afterwards as paid up. The liquidator claims against the three surviving directors, jointly and severally, the sum of \$13,000, less \$125, or so much as may be necessary to pay the creditors of the company in full of their claims.

In his examination for discovery, Spence says this was all done on the advice of the company's solicitor, as being lawfully given as remuneration for promotion expenses. This, of course, could not be done, and there is nothing said as to the reason of this in the minutes.

Now, there was clearly a contract by all these persons with the company to take these shares and pay for them at the par value. Under R.S.O. 1897, ch. 191, sec. 10, sub-sec. 4, it is provided that each petitioner shall be the *bonâ fide* holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement, and sec. 42 says, "no person shall hold office as a director unless he is a shareholder owning stock absolutely in his own right." Thus, it seems to shew quite clearly that these subscribers are bound to shew how the company got value if they ask to be relieved from any payment of their shares.

One argument for the defence may conveniently be dealt with here. It was said that as the charter named the five incorporators provisional directors, and this number was reduced to four at the meeting for organization, the whole proceedings were a nullity.

This, however, answers itself. There was undeniably a contract made by these incorporators with the company to take 1,300 shares (which, at a par value of \$10, would amount to \$13,000). If, therefore, there was never a valid board of directors, there was no way in which these incorporators could be released.

A more substantial defence was that the shares in Mr. Crawford's case had been transferred by him to Manes, and that afterwards, at a meeting of December 14th, 1906, these shares were declared

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forfeited, because the call of 100 per cent. made on that day, payable ten days thereafter, had not been paid.

It is not necessary to point out that this was a wholly illusory proceeding; the only importance that it has is, that this is a clear admission that these shares were wholly unpaid.

The above scheme was the result of Mr. Spence being informed that the original issue of these shares as paid up was void, and that the full liability existed thereunder.

It was contended also that Mr. Crawford was no party to the forfeiture, and that the company took them knowing the whole facts, and that the liquidator cannot take any higher position. It was also suggested that there was a novation and Manes made liable, and Mr. Crawford released.

I have examined the authorities cited in support of this defence, and those cited by counsel for the liquidator. There is no imputation of any moral wrongdoing by any of these persons. It was simply a case of mistake in law. It is not without regret that I feel obliged to hold that the claim of the liquidator is entitled to succeed. The act of the directors at the meeting of November 27th, 1902, in respect of these 1,300 shares, was, in my view, a plain act of misfeasance, for which they are jointly and severally liable. The amount of their liability is the par value of the stock as subscribed, which as against them is fixed by the subscriptions to the original agreement: see *In re Caerphilly Colliery Co.*, *Pearson's Case* (1876), 4 Ch.D. 222; *Re Warton Beet Sugar Manufacturing Co.*, *Alexander McNeill's Case* (1905), 10 O.L.R. 219.

Crawford and Spence appealed from the above judgment, and the appeal was argued on February 17th, 1908, before TEETZEL, J.

*J. D. Montgomery*, for Crawford.

*Eric N. Armour*, for Spence.

*Joseph Montgomery*, for the liquidator.

February 28. TEETZEL, J.:—Appeals by Crawford and Spence from a judgment of James S. Cartwright, Esquire, K.C., Official Referee, holding the appellants liable in damages for misfeasance as directors.

The company was incorporated on November 19th, 1902, and the appellants and three others were the incorporators. The appellants signed the agreement and stock book filed upon the ap-

plication for charter as subscribers for \$3,000 of stock each, and the other incorporators signed for \$7,000 of stock, making in all \$13,000 subscribed.

The appellants and two of the other incorporators were elected directors, and on November 27th, 1902, at a meeting of directors, a resolution was passed to the effect that the stock subscribed by the several incorporators should be allotted to each as fully paid up common stock, and on March 17th, 1903, certificates to this effect were issued accordingly.

It was stated in evidence before the Referee that this was done upon the advice of the company's solicitor, as being lawful in remuneration for promotion expenses, and for services to the company by the incorporators.

It could not be and was not argued that this allotment was within the powers of the directors.

The learned Master held the appellants liable for the face value of the \$13,000 of stock, less \$125 which the subscribers had paid on account of incorporation expenses, basing his judgment on the ground that by signing the agreement and stock book the subscribers were bound to shew how the company got value, and that by issuing the stock as paid up, the subscribers attempted to relieve themselves from liability under the subscriptions and deprived the company of an asset to the extent of the subscriptions.

The learned Referee exempted the appellants from any imputation of moral wrongdoing, and expressed the view that what they did was simply the result of mistake in law, but that nevertheless it was a plain act of misfeasance for which all the directors were jointly and severally liable, and that the amount of the liability was the par value of the stock.

I shall in this judgment dispose only of the appeal by the appellant Crawford, reserving the disposition of the appeal by Spence until after the disposition of the proceedings now pending to place him on the list of contributories.

On August 19th, 1904, Crawford resigned his position as director, and afterwards, on the same day, a transfer of 325 shares then held by him, including the 300 shares originally subscribed for, was made to T. W. Manes and approved of by the board. Manes was one of the original incorporators and a member of the board, and present when the resolution allotting the stock as fully paid up was passed. For this transfer Manes paid Crawford \$125.

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The company, having been advised that the \$13,000 of stock was liable for call notwithstanding the attempt to issue it as paid up, a resolution was passed by the directors on November 23rd, 1906, on the motion of T. W. Manes, making a call of 100 per cent. on the same. This call not having been paid, according to its terms, a resolution was passed at a meeting of the board on December 14th, 1906, which resolution was seconded by T. W. Manes, declaring the stock to be forfeited to the company by reason of the non-payment.

I am of the opinion that under the above circumstances the appellant Crawford is not liable to the extent found by the learned Referee under the provisions of sec. 123 of the Winding-up Act, which is the section invoked in these proceedings. In order to make a director liable under that section, it must not only be shewn that he was guilty of some misfeasance, but that the misfeasance resulted in damage to the company: see *In re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case* (1880), 14 Ch.D. 660.

From the beginning, until he transferred to Manes, Crawford was subject to the same liability to the company for calls on the stock as if the paid up certificate had never been issued, and when he transferred to Manes he was transferring to him unpaid stock, and when the transfer was accepted by the directors the liability for calls passed from Crawford to Manes.

Manes, having had full knowledge of the circumstances, was not in the position of a *bonâ fide* purchaser of paid up stock, and was subject to the same liability for calls as his transferror.

There is nothing in the evidence to shew that Manes was not at the time a man of substance from whom the amount of the stock could have been collected as readily as it could have been from Crawford. There is also nothing to shew any damage sustained by the company in respect of the balance of the \$13,000 of stock by reason of it having been issued originally as paid up. Crawford would, however, I think, be liable under the authorities to pay to the company the amount he received from Manes upon the transfer, namely, \$125.

The judgment appealed from, therefore, will be varied by reducing the amount awarded against Crawford to \$125.

The costs of the appeal will be costs in the cause.

The liquidator's appeal from the judgment of TEETZEL, J., was argued on September 18th, 1908, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*I. F. Hellmuth*, K.C., for the liquidator, contended that all the directors should be held liable for the \$13,000; that the writ against them for misfeasance is a different writ to that against them as contributories: *In re Carriage Co-operative Supply Association* (1884), 27 Ch.D. 322; that all the directors could have paid up at the time and the money would have come to the company's coffers; that under the Ontario Companies Act, R.S.O. 1897, ch. 191, sec. 33, the directors were bound to call up 10 per cent. within one year from the incorporation of the company.

*W. M. Douglas*, K.C., for Thomas Crawford, contended that the directors had not dealt wrongfully with the property of the company; that the shares were never treated as paid up or as the liabilities of the company in any respect; that this was not a case of shares getting into the hands of *bonâ fide* purchasers from whom no calls could be collected; that here the directors could make calls, and did make calls, and then forfeited the stock, as they had a right to do; and that the act of the directors caused no loss to the company: *Buckley's Company Acts*, 7th ed., p. 435.

April 5. Moss, C.J.O.:—Appeal by J. P. Langley, liquidator of the company, from an order made by Teetzel, J., on appeal from an order of James S. Cartwright, Esquire, K.C., an Official Referee, made in the course of proceedings to wind up the company under the Winding-up Act, R.S.C. 1906, ch. 144.

The company was incorporated in November, 1902, with a share capital of \$40,000, divided into 4,000 shares, and carried on business until it was declared insolvent and directed to be wound up by an order made on May 10th, 1907.

The respondent Crawford was one of the incorporators, having been one of the subscribers to the memorandum of agreement of the company, and was named a provisional director in the letters of incorporation. He had subscribed and agreed to pay for 300 shares of the capital stock at the par value of \$10 each. He contributed \$25 towards the expense of procuring the incorporation, which has been treated as a payment on his shares.

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At the organization meeting held on November 27th, 1902, he was, with three others, elected a director, and at a subsequent meeting of the directors he was elected president.

At that time five persons constituted the whole body of shareholders, and all were present at the meeting. At the same meeting of directors it was resolved that the shares of the capital stock subscribed for by each of these five persons be allotted to them as fully paid up common stock or shares of the company.

It was also resolved to offer for sale not more than 1,500 shares to be sold as preferred stock at the par value of \$10 per share, the holders thereof to be entitled to receive out of the net profits dividends equal to but not exceeding 8 per cent. by way of preference and priority to the holders of common stock. At a subsequent meeting of the five shareholders held on the same day the action of the directors was confirmed.

Thereafter the business of the company was proceeded with, a considerable number of preferred shares were disposed of at par, and a few of the remaining shares of common stock were subscribed for, apparently at par, but they do not appear to have been paid for.

In November, 1903, as the result of some arrangement between the five original shareholders, 25 more of the so-called paid up shares of common stock were transferred to the respondent. He continued to hold 325 shares and to act as president until August 19th, 1904, when he resigned his position of director and president, and transferred his shares to T. W. Manes, receiving therefor \$150, deriving in this way a profit of \$125. He never afterwards intermeddled in the affairs or business of the company. He deposed that when he transferred the shares to Manes, so far as he knew the latter was perfectly solvent and well able to meet any liabilities he might incur. In November, 1906, the then board of directors made a call of 100 per cent. upon the then holders of 1,300 shares, including the 325 formerly held by the respondent. Default having been made in payment of the call, the board, on December 14th, 1906, declared these shares to be forfeited to the company.

In the course of the winding-up proceedings steps were taken by the liquidator to charge the respondent as a contributory upon and in respect of the shares, but the Official Referee ordered his name to be struck off the list, upon the ground, doubtless, that

the shares having been transferred to Manes long before the commencement of the winding-up proceedings, the respondent could not be rendered liable as a contributory in respect of them.

The liquidator then applied, under sec. 123 of the Winding-up Act, for an order declaring that the respondent and others, as directors of the company, were guilty of misfeasance or breach of trust in issuing 1,300 shares of the capital stock as fully paid up, and that they were jointly and severally liable to the liquidator to the extent of the unpaid liability on the stock at the time of the issue.

The Official Referee found and determined that the respondent, and T. W. Manes, and J. M. Spence, were jointly and severally liable to pay to the liquidator the sum of \$12,875, or so much thereof as they or any of them should be called upon to pay in respect of any unpaid debts or liabilities of the company, including the costs of the liquidation and of the application.

Upon appeal by the respondent, Teetzel, J., reduced the amount of the respondent's liability to \$125, the profit he derived from the sale to Manes.

Both the Official Referee and the learned Judge exonerated the respondent from any imputation of moral wrongdoing, and it is undeniable that he acted in good faith. They also agreed that the allotment of the shares as fully paid up shares was improper and could not be sustained under the circumstances. And as to this there can be no reasonable doubt. At the time of the allotment the shares were the property of the company, and, apart from any other question, the position of the respondent as director precluded him from joining in or accepting what was virtually a gift to him of the company's property. Whether, apart from the agreement to pay for them, they were of any substantial value, will be considered later on. That the shares did, at that time, belong to the company and could only be allotted as such has been made clear by the certificate of the Official Referee, dated January 8th, 1909, given in response to inquiries directed by the Court.

The difference between the Official Referee and Teetzel, J., as to the extent of the respondent's liability, arises from the different points of view from which they have regarded the question of damage resulting to the company. Section 123 of the Winding-up Act, which is almost identical in terms with sec. 165 of the Com-

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panies Act, 1862 (Imp.), and sec. 10 of the Companies (Winding-up) Act, 1890 (Imp.), enacts that: "When in the course of the winding-up . . . it appears that any past or present director . . . has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may . . . examine into the conduct of such director . . . and . . . make an order requiring him to repay . . . or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the Court thinks fit."

It has been held that the corresponding sections of the Imperial Acts are confined to claims the successful assertion of which will increase the assets of the company, and they are not to be extended to all manner of claims against directors and other persons named in the section. Under it the inquiry is threefold: (1) Has the person sought to be charged been guilty in relation to the company of one or more of the acts specified? (2) If so, has loss resulted to the company or its assets for which compensation ought to be directed to be made? And (3) what is the extent of the compensation which ought to be directed?

In *In re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279, in appeal from a decision of Vaughan Williams, J. (reported [1896] 1 Ch. 331), Lindley, L.J., discussing the object of these sections, said (p. 283): "That object was to facilitate the recovery by the liquidator of assets of a company improperly dealt with by its promoters [sec. 10 of the Imperial Act of 1890 includes promoters who are not named in sec. 123], directors, or other officers. The section applies to breaches of trust and to misfeasances by such persons. I agree that the section does not apply to all cases in which actions will lie by the company for the recovery of damages against the persons named; it is easy to imagine cases of breach of contract, trespasses, negligences, or other wrongs, to which the section is inapplicable, and some such have been the subject of judicial decision; but I am not aware of any authority to the effect that the section does not apply to the case of an officer who has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible by an action at law or in equity.

Such a breach of duty, if established, is a 'misfeasance' within the meaning of the section . . . ." See also the remarks of Rigby, L.J., in *In re London and General Bank* (No. 2), [1895 2 Ch. 673, at p. 691.

What was done by the respondent in accepting as fully paid up the shares in question in this case, though done under an honest belief in its propriety, cannot be upheld. It follows as of course that the profit of \$125 made upon the transfer to Manes must be accounted for.

There remains the question whether that is the full measure of the respondent's liability to contribute to the assets of the company by way of compensation.

*Daniell's Case* (No. 2) (1857), 23 Beav. 568, 1 De G. & J. 372, the authority of which has been somewhat shaken by more recent decisions—see *In re Western of Canada Oil Lands and Works Co.*, *Carling, Hespeler, and Walsh's Cases* (1875), 1 Ch.D. 115—does not seem applicable to the facts of this case. There Daniell was held and treated as a contributory on the footing of one who still remained a shareholder. So in *Pearson's Case* (1876), 4 Ch.D. 222, the respondent was still the holder of the shares, and there was no evidence of their value when he became the holder of them. Here the respondent ceased to be a shareholder before the commencement of the winding-up proceedings, and, but for the circumstance of his having been a director, no liability could attach to him as contributory or otherwise. He has already been held not to be liable as a contributory, and that is now final as against the liquidator.

But this does not solve the question of the extent of liability under sec. 123 of the Act.

In estimating the amount of compensation, the fact that the director sought to be charged, and the other directors with whom he joined in declaring their shares to be fully paid up, had actually subscribed for their shares, and so become liable to pay for them at their par value, while not to be overlooked, is by no means conclusive of the loss to the company by reason of the directors' act. All the circumstances must be considered, and the Court is to say what is to be paid by way of compensation, not by way of punishment: *In re Canadian Land Reclaiming and Colonizing Co.*, *Coventry and Dixon's Case*, 14 Ch.D. 660, per Bramwell, L.J.,

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at p. 673. The act of misfeasance was not failure to pay or to enforce payment from the others. Nor would that alone be a "misfeasance" within the terms of sec. 123. Calling them fully paid up shares did not release the liability to the company. The holders remained indebted in respect of them, and the company could only be deprived of the right to recover payment from any one in whose hands they might be by that person shewing a purchase under such circumstances as would debar action at the suit of the company against him; for example, a purchase on the faith of a certificate from the company stating that the shares were fully paid, made by one ignorant of the facts. In that case a different view might be taken: see *Freeman's Case* (1906), 12 O.L.R. 149.

No case has been cited or referred to in which it was decided that failure by directors to enforce payment of the amount due on shares is a misfeasance or breach of trust within the terms of sec. 123. The decisions, so far as they go, seem to point to the contrary conclusion: see *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450.

The principles applicable to a case like the present were fully considered in *Shaw v. Holland*, [1900] 2 Ch. 305. It is true that was not a proceeding under the Winding-up Acts, but, notwithstanding the expression of opinion of Sir George Jessel, M.R., in *In re National Funds Assurance Co.* (1878), 10 Ch.D. 118, at p. 125, it is now settled that sec. 123 does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts: *Coventry and Dixon's Case* (*supra*). In *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, Lord Macnaghten said (p. 669): "The 165th section of the Act of 1862 has often come under discussion, and it has been settled—and I think rightly settled—that that section creates no new offence and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but in the nature of a breach of trust resulting in a loss to the company."

In *Shaw v. Holland* (*supra*) there had been an improper allotment of shares to two directors of a company at an undervalue.

In an action by a shareholder, it was held that the directors must account to the company for the profits which they had derived from the sale of such of the shares thus allotted as they had disposed of, and that as to shares which they retained, the proper measure of damage was under the circumstances the market value of the shares at the dates at which they were respectively allotted to the directors.

It was also held that the market value was not to be fixed by shewing the price obtained on sales of small lots out of a large number of shares.

The result of the authorities seems to be that in endeavouring to ascertain the loss, if any, to the company, the whole of the circumstances must be looked at; and that the value is to be ascertained as of the date of the allotment.

It is necessary to examine the facts in order to arrive at the position of the company and the value to it of the shares at the time when they were allotted as fully paid up.

The share capital was \$40,000, in 4,000 shares of the nominal value of \$10 each. Of the 4,000 shares, 1,500 were set apart to be sold as preferred stock at the par value of \$10 per share, the holders of which were to receive out of the net profits of each year the whole amount thereof until the profits should be equal to a dividend of 8 per cent. on the preferred stock sold at the time of declaring dividends, and no dividend was to be applied to the common stock until the profits should exceed a sum equal to 8 per cent. on the preferred stock sold, the surplus profits over and above the 8 per cent. dividends to be applied as dividends on the subscribed common stock.

This left 2,500 shares of common stock, of which 1,300 were allotted as already stated, leaving 1,200 for subscription or sale.

It is obvious that any persons desirous of investing in the shares of the company would naturally invest in the preferred stock, at least until the business had demonstrated its ability to produce dividends for the holders of the common stock. And what appears is that while 605 shares of the preferred stock were subscribed and paid for during the time that the company was in existence, only 10 shares of common stock were subscribed for, and as far as the books shew they were not paid for, but were afterwards cancelled for default.

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There is a reference in one of the financial statements to 1,303 shares of common stock, in a connection which would go to shew that only 3 shares were subscribed for in addition to the 1,300. In the same statement the preferred stock is put at 500 shares, though this does not seem to agree with the share register.

But, however that may be, it is obvious that there was no market for the common stock, and that at the date when the 1,300 shares were declared to be fully paid up the shares in the common stock were of no intrinsic value to the company. As to the 1,300 shares, the liability of the holders still continued, and no act was done which deprived the company of its remedy against the holders, unless the act of the company done long after the respondent had parted with his shares, in declaring them forfeited and cancelling them, has had that effect. But that is a question which it would not be proper to discuss here. The respondent's act in transferring his shares to Manes was not illegal or wrongful, and was not, any more than the failure to pay and enforce payment from the others was, an act of misfeasance or a breach of trust within sec. 123.

In any view of the case the respondent is not responsible in this proceeding for any sum beyond the \$125 with which he was charged by the order under appeal.

The appeal should be dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The more material facts of this case are not in dispute, and indeed all of its main features are indisputable. It is indisputable that the respondent and his co-directors were guilty of a grave wrong, as well as a grave breach of trust; it is indisputable that they allotted and issued to themselves all of the stock in question as fully paid up shares, when in truth not a farthing had been, or was ever, paid for it, directly or indirectly, nor was there ever any sort of ground for believing or suggesting that there had been; it is indisputable that for at least nearly two years the respondent and his co-directors held themselves out as the holders of such fully paid-up stock, and actively acted, he as president, and they as the other directors, of the company; it is indisputable that, whatever the respondent may have thought, or whatever his voluntary intention might at any time have been,

he was the holder in his own right of the shares which he thus acquired, and was not in law or in equity a trustee for any one else; though it may be added this is quite an immaterial feature of this case, as it is not one for contribution, but is one for misfeasance; and it ought to be indisputable that at the time of thus acquiring the stock in question it was worth, at least, par. It is indisputable that these persons believed that they were going into a money-making concern; that the company would be a profitable one—that, in short, it was a good thing. So persuaded were they of this that they jealously excluded all others but themselves from the “ground floor,” thus adapting well-known and well-worn modern methods, and carrying it to such an extent that although they had issued some of these shares to the wife of one of their number, they insisted upon a recall of them and an equal division of them among themselves, and so closely guarded and controlled the whole stock in their own hands that when one of their number transferred to another person even ten shares he was obliged to re-acquire them. But these evidences of the then selling price or value of the shares need not be pursued, for they have themselves fixed the price in a manner indisputable by them, each of them having, at the time of incorporation, subscribed for the shares subsequently allotted to him at par, and agreed to take the shares at the price at which it is now sought to charge them, and upon this agreement obtained their letters of incorporation.

It ought also to be indisputable that by thus untruly holding themselves out as paid up shareholders in a real company, when in fact not one farthing had been paid into it for stock, and instead of selling its stock and calling it up, even to the extent required by the enactment under which they were incorporated, retaining it all in their own hands and control in such a manner that the company had no capital whatever to work upon, they misled those who dealt with the company, to their loss; and it is only the extent of such loss, if less than the price of their stock, that they are asked to make good. And it ought also to be indisputable that by posing as paid up shareholders and officers of the company the president and his co-directors were indirectly advantaged in a business and pecuniary sense to an extent which it is difficult to estimate. And, still further, it may very well be that if these

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persons had paid for their shares and had sold and called up the rest of the capital stock, the company might have been a continuing success instead of going to the wall. But these are not features of the case affected by the legal liability of the parties.

That legal liability seems to me to be plain. The respondent and his co-directors converted to their own use and wrongfully deprived the company of the use and benefit of the stock in question, and, apart from any other rights the company might elect to enforce, are liable for the value of this fully paid up stock at the time of such conversion, and that unquestionably was at least its par value, as I have before said: see *per* Collins, L.J., in *Shaw v. Holland*, [1900] 2 Ch. 305, at pp. 312-3.

But if the wrong is to be looked upon as suggested by Mellish, L.J., in *In re Western of Canada Oil Lands and Works Co.*, 1 Ch.D. 115, at p. 127, the result is the same; the allotment and the issue of the stock were right, the wrong was in not obtaining the price for which the stock—fully paid up shares—was sold, that is, its par value. It is indisputable that if the fully paid up stock had been issued to a stranger the price ought to have been received and have gone into the capital of the company; and it ought to be equally indisputable that when issued to the president and directors of the company at least the same care should be taken and the same result effected.

Upon plain general principles I can see no fair means of escape by the respondent from the liability to which the learned Referee held him to be subject; and the cases also shew a like liability, on whatever ground it may have been placed.

*Daniell's Case*, 1 De G. & J. 372, see also 23 Beav. 568 and 22 Beav. 43, and *Pearson's Case*, 4 Ch.D. 222, are quite in point and decisive against the respondent, and ought, I think, to be followed in this Court, there being no case to the contrary.

The case upon which the learned Judge seems to have placed reliance—*Coventry and Dixon's Case*, 14 Ch.D. 660—is not at all in point, for there the directors had never been shareholders in any shape or form.

The case of *Cavendish Bentinck v. Fenn*, 12 App. Cas. 652, is not only not in point, but was decided on the ground that misfeasance had not been proved; in this case it is undeniable.

The case of *Shaw v. Holland*, before referred to, is very much

in the appellant's favour, and goes further than necessary here; for two of the learned Judges there accepted the rule that in a case analogous to this a wrong-doing director ought to be fixed with the highest possible price which the shares ever attained while in his hands. The ruling that the price given for a few shares did not necessarily prove the value of a much larger quantity in that case gives no assistance in this case.

And *Carling, Hespeler, and Walsh's Case*, 1 Ch.D. 115, is also, I think, strongly in the appellant's favour. There the directors had acquired their shares from a shareholder, and had no contract with the company in respect of them. It was held that they could not be made contributories, and were discharged from such liability, but without prejudice to proceedings against them for misfeasance, as in this case.

The case must not be treated as one of the purchase and allotment of unpaid stock; forgetting that it is not such a case is very apt to throw one off the right track. It is the case of a purchase and allotment of fully paid up stock, the price of which ought to have been paid before the certificates were issued; and so no question of calls, nor any other question applicable to unpaid stock, arises. As fully paid up stock it was applied for, and was allotted, and as such ever afterwards held, and as such it was sold and transferred to his purchaser, for valuable consideration, by the respondent. Nor should we say that the damages must be assessed as of the time when the wrong was done, and then proceed to assess them as of the time of the failure of the company. Is it possible to conceive of the respondent's stock being sold for \$150, at the time it was allotted to him, or for even one cent less than its nominal value—the price at which he subscribed for it?

It seems to me somewhat farcical under these circumstances to contend that the respondent's and his co-directors' liability for misfeasance, which arose when they issued the stock without obtaining the price and bringing it into the coffers of the company, could be discharged by a sale of the stock nearly two years after, or by a colourable or even a real cancellation of it after that again. Both their liability and the amount of it were fixed when they obtained the paid up shares under their agreement at its nominal value.

I cannot say, in the words of Lord Esher (1 Ch.D. p. 129), that

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I would be very sorry to be obliged to agree in the judgment in appeal; that I would be exceedingly happy in being able to agree with the judgment of the learned Referee. On the contrary, if personal feelings may be expressed, I can safely say that I give place to no one in my regret that so reputable a gentleman as the respondent should have incurred so great a liability as that which I think plainly rests upon him, but that cannot warp my judgment as to the character of the conduct of all of these directors in giving to themselves, as fully paid up shares, \$13,000 of the company's property without giving a farthing's consideration for it; and not only that, but retaining the whole of the rest of the stock so that they were carrying a large business concern with an ostensible capital of \$40,000, when in fact there was not really one dollar of capital in it.

Every one, even these directors, will, I hope, now agree in the next following words of that learned law lord, namely: "I think that the law ought to be kept as wide as it can be in order to put an end if possible to this system of directors taking paid up shares."

I would allow the appeal, and restore the order of the learned Referee, which is all that the appellant desires or asks.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

FRASER V. PERE MARQUETTE R.W. CO.

*Railway—Destruction of "Crops"—Sparks from Locomotive—Marsh Hay Cut and Baled—Railway Act, R.S.C. 1906, ch. 37, sec. 298.*

The Railway Act, R.S.C. 1906, ch. 37, sec. 298, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage:"—

*Held*, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives.

Judgments of TEETZEL, J., and a Divisional Court reversed.

THIS was an appeal by the defendants from the judgment of a Divisional Court affirming the judgment of TEETZEL, J., at the trial, in favour of the plaintiff for \$375 damages.

The action was brought by the plaintiff to recover damages caused to a quantity of marsh hay belonging to him, which was at the time lying upon the ground of the Wallaceburg Sugar Co. at Wallaceburg, by reason of a fire alleged by him to have been caused by a spark from a locomotive engine of the defendants.

The action was tried at Chatham on June 15th, 1908.

*A. B. Carscallen*, for the plaintiff.

*F. Stone and W. E. Gundy*, for the defendants.

July 9. TEETZEL, J.:—Action for damages under sec. 298 of the Railway Act of Canada, R.S.C. 1906, ch. 37, which provides that "whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction," etc. The plaintiff owns a quantity of marsh land from which he annually cuts grass commonly called marsh hay. It is also called sea grass, and besides being used for fodder it is used in the manufacture of mattresses. A large quantity of it had

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been cut and baled, and at the time of its destruction was piled along a siding used by the defendants in connection with the Wallaceburg Sugar Refinery—awaiting shipment. I found at the trial as a fact that the hay was destroyed by fire caused by sparks from one of the defendants' locomotives, and that the value was \$375. Two questions arise for determination:—

1. Was the material covered by the word "crops" in sec. 298?
2. If it was a crop while in the field, did it lose that character when baled and delivered for shipment?

In the Standard Dictionary the word "crop" is defined as "plants or grains collectively that are cultivated for consumption; also, the soil product of a particular kind, place, or season. Anything gathered and stored at a proper time and for future use."

The grass in question is a perennial, and, besides the work of cutting and gathering, the only work bestowed upon the ground consists in burning off, every spring, the old growth of the former year.

I am of the opinion that if this material had been destroyed in the field, whether before or after it had been cut, it would be well within the above definition of the word "crop."

Mr. Stone presented a very ingenious argument, that, conceding the above to be the correct view, when the material was removed from the farm and piled along the defendants' track for shipment it lost the character of "crop" within the contemplation of sec. 298, and became merchandise. I am unable to adopt this argument. The Legislature has not made provision in respect of crops in any particular place or while on a farm only, but in respect of crops generally, no matter where situate.

Judgment will therefore be for the plaintiff for \$375 and interest since issue of writ, and costs.

The defendants appealed to the Divisional Court, and their appeal was heard on October 6th, 1908, before FALCONBRIDGE, C.J.K.B., and BRITTON and RIDDELL, JJ.

*D. L. McCarthy*, K.C., and *W. E. Gundy*, for the defendants.

*A. B. Carscallen*, for the plaintiff.

October 22. RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Teetzel.

The plaintiff owns a quantity of marsh lands, far removed from the line of the defendants' railway. Upon this kind of land is grown a kind of wild grass called sea grass or wild hay, sometimes used for fodder, but generally baled up and sent away for use in the manufacture of mattresses. The grass in question had been grown upon the land already mentioned, there baled up, and sold (as the evidence has it) to a firm in Toronto for making mattresses. As it had to be shipped over the defendants' line of railway or an electric railway, the plaintiff obtained permission from the Wallaceburg Sugar Co. to pile the grass on their land near the railway of the defendants for the convenience of shipment, and had accordingly drawn the bales and there piled them in three piles. After the hay or grass had been so piled for a month or six weeks, it was burned by fire originating in sparks from the defendants' locomotive. No negligence was proved on the part of the defendants, but my learned brother considered this not necessary under the statute, and held the defendants liable, giving judgment against them for \$375 and costs. The property was still in the plaintiff and not in the purchaser.

At the common law, one setting fire on his own premises was obliged to see to it that it did not escape; he was liable to an action if it burned the property of another, and could get rid of liability only by shewing that the spreading to his neighbour's was due to violence of the wind or something of that nature.

*Turberville v. Stamp* (1698), 12 Mod., p. 152: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in the fields is as much his fire as his fire in his house . . . and he must at his peril take care that it does not, through his neglect, injure his neighbour; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence." I do not give any other reference, as the whole matter is fully discussed in *Furlong v. Carroll* (1881), 7 A.R. 145; see pp. 157 *et seq.*, in which the cases in our own Courts are mentioned and in part considered.

The statutes of Anne, (1707) 6 Anne ch. 31, and (1711) 10 Anne ch. 14, relieved from liability those in whose house any fire shall accidentally begin, and this exemption was extended by (1774) 14 Geo. III. ch. 78.

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It was not long after the successful application of steam power to locomotion that the question was brought up as to the liability of railway companies for fire caused by their locomotive engines. In a number of cases it was more than suggested that in case of fire so caused the companies became insurers; *e.g.*, in *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781, at p. 783, Martin, B., says: "I held, in a case tried at Liverpool in 1853, that if locomotives are sent through the country emitting sparks, the persons doing so incur all responsibility of insurers: that they were liable for all the consequences. I invited counsel to tender a bill of exceptions to that ruling."

At length the matter came up squarely for decision in *Vaughan v. Taff Vale R.W. Co.* (1858), 3 H. & N. 743. A wood adjoining the defendants' railway was burnt by sparks from the locomotives. On several previous occasions it had been set on fire and the company had paid for the damages. It was shewn that the defendants had done everything that was practicable to make the locomotives safe, but it was admitted that with these precautions the locomotives had been the means occasionally of setting fire to the wood. In this state of facts, Bramwell, B., the trial Judge, held that the jury were justified in finding a verdict for the plaintiff, and his ruling was upheld by the full Court of Exchequer, composed of Pollock, C.B., Martin, Bramwell, Watson, and Channell, BB. Upon appeal, the Court of Exchequer Chamber (1860), 5 H. & N. 679, reversed the judgment, and laid down the rule that a railway company authorized by the Legislature to use locomotive engines, are not responsible for damage by fire, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire and are not guilty of negligence in the management of the engine.

This continues to be the law in England; and it was at once accepted and acted on by our Courts.

When the new Railway Act of 1903, 3 Edw. VII. ch. 58 (D.), was passed, it contained a provision (sec. 239) entirely changing the existing law.

"239 (2). Whenever damage is caused to crops, land, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage . . . ."

"3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurance thereon in its own behalf."

This in the revision became R.S.C. 1906, ch. 37, sec. 298 (1) and (3), a slight verbal change appearing in sub-sec. 3, "for which it may be held liable to compensate the owners for loss or damage by fire caused by a railway locomotive, and may procure," etc., etc.

The argument of the appellants is threefold: (1) while admitting that the grass or hay is "crops" while growing, and even while on the premises of the grower, it is argued that it had ceased to be "crops" at the time of the fire; (2) the statute intended, it is argued, to render the railway company liable in the absence of negligence only for such property as insurance could be procured upon, and no insurance could be procured upon such property so situated by the railway company; (3) contributory negligence on the part of the plaintiff in piling hay so near the track of the railway company, and in a place of danger.

It is a matter of common knowledge that our legislation was based upon the legislation in some of the United States. I have thought it proper to examine with some care the legislation of such of the States as are stated to have such statutory provisions, and the cases upon such legislation.

In Massachusetts, as early as 1837, it was provided that railway companies should be liable for all injury caused to the buildings or other property of others by fire from their locomotives, "unless the said corporation shall shew that they have used all due caution and diligence and employed suitable expedients to prevent such injury." And "that any railroad corporation shall have an insurable interest in property along its route for which it might be so held liable in damages, and might procure insurance thereon in its own behalf." Similar legislation still exists in some of the States—*e.g.*, Vermont. In 1840 this statute was repealed in Massachusetts and re-enacted, leaving out, however, the saving clause and making the responsibility of the railway company absolute and independent of negligence. And similar legislation is now to be found in certain other of the States.

Looking now at the legislation and cases, the three points of argument of the appellants will be borne in mind. In the examina-

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tion of the cases everything which would bear at all upon the present has been set out once for all.

In Massachusetts, the statute 1840, ch. 85, sec. 1, reads in part: "When any injury is done to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible in damages to the person or corporation so injured:" *Luke Hart v. Western Railroad Corporation* (1847), 13 Met. 99, the case of first impression (buildings and contents and trees); *John Ross v. Boston and Worcester Railroad Co.* (1863), 6 Allen 87; *Pierce v. Worcester and Nashua Railroad Co.* (1870), 105 Mass. 199 (farm house, outbuildings and contents). In *William P. Perley v. Eastern Railroad Co.* (1868), 98 Mass. 414, the property burnt was wood upon the plaintiff's land—the fire had caught in grass and stubble near the railroad track and ran rapidly over the lots of intervening proprietors about half a mile, and then caught in the plaintiff's wood and burnt it. It was held that the statute applied, the fire having proceeded from the defendants' locomotive in a direct line, and without any break, to the plaintiff's property: *Edward Safford v. Boston and Maine Railroad Co.* (1870), 103 Mass. 583 (fire from engine burnt a wood pile of defendants, then spread to and burnt a freight house, and then the house of the plaintiff, 1,600 feet from the station house and 740 feet from the railroad track); *Ingersoll v. Stockbridge and Pittsfield Railroad Co.* (1864), 8 Allen 438 (buildings (?) ); *Lymon v. Boston and Worcester Railroad Corporation* (1849), 4 Cush. 288 (buildings); *Trask v. Hartford and New Haven Railroad Co.* (1860), 16 Gray 71 (machinery, tools, etc., in a building, and a fence). In this case, Hoar, J., says, p. 72: "A fence is not so commonly insured, probably because its value and risk do not make insurance desirable, but it certainly can be insured, and is insurable. Whether a just construction of the statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of the railroad corporation created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make the corporation liable."

New Hampshire, introduced first in 1850: "The proprietors

of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road:" *Hooksett v. Concord Railroad* (1859), 38 N.H. 242 (bridge burnt by fire from a bridge of the defendants burnt by fire from one of their engines); *Rowell v. Railroad* (1876), 57 N.H. 132 (saw mill and machinery); *Smith v. Boston and Maine Railroad* (1884), 63 N.H. 25 (barn buildings and contents); *Laird v. Railroad* (1882), 62 N.H. 254 (building on another's land).

In Vermont General Statutes, ch. 28, sec. 78, the railroad company are relieved if they can prove "that they had used all due caution and diligence, and employed suitable expedients to prevent such injury:" *Cleaveland v. Grand Trunk R.W. Co.* (1869), 42 Vt. 449 (house, etc.); *Grand Trunk R.W. Co. v. Richardson* (1875), 91 U.S. 454 (buildings).

Connecticut, in 1881, ch. 92: "When any injury is due to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so insured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own own behalf:" *Grissell v. Housatonic R. Co.* (1887), 9 Atl. Rep. 137, 54 Conn. 447 (fences, growing trees and herbage). In this case, at p. 468, the Court speaks of the disagreement as to construction of the statute, and adds: "In the State of Maine it is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees and shrubbery; but it is held not to extend to a pile of cedar posts, temporarily deposited near the railroad," citing the *Chapman* and *Pratt* cases. The Court continues: "The statute would be extremely uncertain if its enforcement depended on the ability of the railroad to obtain insurance. The withdrawal of insurance companies from issuing policies in a particular State, owing to unfriendly legislation, or an alteration of their charters, might in effect nullify the law as to railroads in that State;" and comes to the conclusion that the evidence to shew that no insurance could be effected upon fences, growing

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trees, and herbage was rightly rejected, the liability of the railroad company depending upon the construction of the statute and requiring no separate consideration. The defendants were held liable: *Simmonds v. New York and New England R.R. Co.* (1884), 52 Conn. 264 (peat, standing wood, and fences).

Michigan, 1 How., Stat. 3378: Railroad companies are liable for all loss, etc., "provided that such railroad company shall not be held so liable if it prove to the satisfaction of the Court or jury that such fire originated from fire by engines, whose machinery, smoke stack or boxes were in good order and properly managed," etc., etc.: *Peter v. Chicago and West Michigan R.R. Co.* (1899) 121 Mich. 324 (lumber in mill yard).

Missouri Rev. Stat. 1889, sec. 2615: "Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person or corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages:" *Mathews v. St. Louis and San Francisco R.R. Co.* (1893), 121 Mo. 298, (1896), 165 U.S. 1 (house, barn and outbuildings, personal property therein, trees and shrubbery). At p. 315, Gantt, J., giving the leading judgment, says: "When it was demonstrated that it was a common occurrence, that the company had the right to run its trains at all times of day and night, and the injured party was powerless often to shew negligence, on account of his inability to shew what particular train had set out the fire, or the particular cause of the fire, and because the owner was entirely innocent in the premises of any negligence, it was determined by the legislation that when one of two innocent parties must suffer, the one who operated the dangerous agency should suffer the loss:" *Campbell v. Missouri Pacific R.R. Co.* (1894), 121 Mo. 340, 24 S.W. 591 (building, fences, shrubbery, etc.); *Adams v. St. Louis and San Francisco R.R. Co.* (1894), 28 S.W. 496 (nursery stock planted by lessee, on agreement with lessor that it might be removed by lessee). In both of the two last-named cases, the argument was raised that the railway company could not get insurance upon

the property and consequently (as was argued) the company was not liable for such property. The Maine cases were relied upon, but the Court refused to follow them. "We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads; nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection, and indemnity from fires, as the owner of the property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation:" *Campbell v. Missouri Pacific R.R. Co.*, 121 Mo. 340, at p. 352; see, also, *Matthews v. Missouri Pacific R.R. Co.* (1898), 142 Mo. 645 (barn, etc.).

Iowa Code, 1873, sec. 1289: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway . . . ." *Rodemacher v. Michigan and St. Paul R.R. Co.* (1875), 41 Iowa 297 (fences and timber); *West v. Chicago and North-Western R.R. Co.* (1889), 77 Iowa 654 (stacks of hay).

Colorado (1874) Gen. Stat., sec. 2798: "Every railroad corporation operating its line of road, or any part thereof, in this State, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof:" *Union Pacific R.R. Co. v. De Busk* (1888), 12 Colo. 294, 20 Pac. Rep. 752 (hay). The hay was set on fire from growing grass to which fire had been communicated from a locomotive: *Denver Texas and Gulf R.R. Co. v. DeGraff* (1892), 2 Colo. App. 42 (2,000 acres of native grass or pasturage); *Union Pacific R.W. Co. v. Tracy* (1894), 19 Colo. 331; *Union Pacific R.W. Co. v. Williams* (1893), 3 Colo. App. 526 (barn and contents). In this case the Court said: "In *Union Pacific R.W. Co. v. Arthur*, 2 Colo. App. 159 . . . the Court says, 'We are at a loss to see how the defence of contributory negligence can be invoked as a defence where there is no law requiring precautionary action on the part of the party damaged, and no question of negligence on the part of the corporation can be made or adjudicated.' Of course, if a party should knowingly or purposely place his property in a situation where sparks

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from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction. But such an act would scarcely come within the definition of contributory negligence; it would be a fraud from which its author would not be permitted to have an advantage."

South Carolina, Gen. Stat., sec. 1511: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route, for which it may be held responsible, and may procure insurance thereon in its own behalf." *Thompson v. Richmond and Daville R.R. Co.* (1885), 24 So. Car. 366 (cotton contained in a house of which plaintiff was tenant). The argument that the property for which the railway company should be held liable is that upon which they were authorized to effect insurance is noticed, but not decided, as it was considered that the property was insurable by the railway company: *McCandless v. Richmond, etc., R.R. Co.* (1892), 38 So. Car. 103 (wood, timber, etc.); *Hunter v. Columbia, etc., R.R. Co.* (1893), 41 So. Car. 86 (a gin house and contents).

Maine, Laws of, 1842, ch. 9, sec. 5: "When any injury is done to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured . . ." In *Chapman v. Atlantic and St. Lawrence R.R. Co.* (1854), 37 Me. 92, an action for damages caused by the burning of cedar posts, the fire having been first communicated by the engine to certain combustible matter near the posts and then through this matter to the posts, the plaintiff had in the winter placed these cedar posts upon the land of another with his consent, some five or eight rods from the railroad track of the defendants. It was held that the plaintiff could not recover upon the ground that the right to insure was co-extensive with the liability of the railway company to insure. "To hold that the liability extends to those articles of movable

property which have no established location, but may be deposited and removed with such facility as to render insurance impracticable and unavailing, would be unreasonable, as it would extend the liability of those corporations far beyond the means afforded for their protection. This manifestly is not the intention of the statute . . . In view of these considerations, the conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporations is to be determined by the principles of the common law:" p. 96. It may be well to set out the statutory provisions as to insurance. It follows in the same sentence the extract from the statute above set out, and is divided but by a semi-colon: "and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance therein in its own behalf." In *Pratt v. Atlantic and St. Lawrence R.R. Co.* (1856), 42 Me. 579, it was (according to the head note) held that a railroad company is not liable for damages by fire from its engines to cedar posts deposited within a few rods of the track and intended for use in some other place within a short time. An examination of the case itself shews that the decision was as to standing timber, for which it was held that the company would be responsible; the *Chapman* case is, however, cited apparently with approval. In *Lowney v. New Brunswick R.R. Co.* (1886), 78 Me. 479, it was held that a railway company is not liable for damages to a pile of sleepers deposited near its track caused by fire communicated from one of its locomotives; and that before the owner of such ties can recover he must prove that the fire was due to the negligence of the defendants. The sleepers had been deposited three years before the fire near "Shaw's barn," apparently on Shaw's land, and the fire had been first communicated to Shaw's barn and then to the sleepers. The Court held, following the *Chapman* and *Pratt* cases, p. 480: "The statute does not include movable articles that are only temporarily left near the track and are liable to be changed at any time:" *Bean v. Railroad* (1873), 63 Me. 293 (store and contents). In *Thatcher v. Maine Central R.R. Co.* (1893), 85 Me. 502, it was held that a railroad company is responsible for loss by fire

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of lumber piled in a permanent lumber yard near its track. The Court said, at p. 508: "We do not intend . . . to overrule any of the previous decisions of this Court . . . It cannot be properly said that the plaintiff's lumber, piled on his piling place, occupied by him in the prosecution of his business as a lumber manufacturer from year to year, in such quantities, was placed there for a temporary purpose only. It had the elements of permanency in its character; certainly as much so as the stock of manufactured chairs . . . or a stock of merchandise . . ."

It will be seen that no assistance is given by these cases in determining the meaning of the word "crops," nor indeed was it to be expected, as in none of these statutes was the word used.

Why the Parliament of Canada in passing such legislation saw fit to select certain kinds of property, and in consequence used the quoted word, must be a matter of conjecture. We must take the language as we find it, and apply the usual tests to determine the meaning. "Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous." *In re Hassard and City of Toronto* (1908), 16 O.L.R. 500, at p. 510: "It is the duty of a Court of justice not to make a statute or by-law reasonable, but to expound it as it stands according to the real meaning of the words used," etc., etc.

We must give effect to the meaning of the words used, not to the meaning which we may guess may have been intended.

If the word "crops" has only the one meaning, *cadit quæstio*. But this is not the case. The root meaning of the word is "something protruding:" see Century Dict., *sub voc.* "crop;" Kluge's Etymol. German Dict., *sub voc.* "Kropf;" but in ordinary parlance many meanings are attached to it, perhaps the most common being Nos. 2, 3, and 6 of the Century Dictionary:—

"2. Corn and other cultivated plants grown and garnered; the produce of the ground; harvest . . . in a more restricted sense, that which is cut, gathered or garnered from a single field, or of a particular kind of grain or fruit, or in a single season.

"3. Corn and other cultivated plants while growing; as . . . the crops are all backward this year;" (the word "cultivated" should be left out, no one but has heard and spoken of the hay crop while it was still growing, and it need not be cultivated hay or grass).

"6. Anything gathered when ready or in season, as the ice crop."

In the other lexicons and dictionaries which I have consulted much the same definitions are given. For example, in the Standard Dictionary:—

"1. The plants or grain collectively, that are cultivated for consumption; also the soil-products of a particular kind, place, or season; harvest.

"2. Anything gathered or stored at a proper time and for future use, as a crop of ice.

"3. A collection or quantity of things produced or grown, as a crop of lies. (Mrs. H. B. Stowe speaks of 'an abundant crop of noisy children.')

Murray's New English Dictionary:—

"8. The annual produce of plants cultivated or preserved for food . . .; the produce of the land, either while growing or when gathered; harvest.

"9. The yield or produce of some particular cereal or other plant in a single season, or in a particular locality.

"(b) The annual or season's yield of any natural produce. In East Anglia we talk of crops of lambs, turkeys, geese, etc.," but this is, of course, dialectic, so a season's crop of logs, an annual ice crop.

Latham's English Dictionary:—

"1. Anything cut off.

"2. Harvest, corn gathered off a field; product of the field."

Wright's English Dialect Dictionary *sub voc.* "crop" gives the East Anglian use of the word referred to in Murray's.

Wharton's Law Lexicon, 10th ed.: "Crop, corn, hay, and such other produce as can be cut and stored up."

Black's Law Dictionary: "Crop. The products of the harvest in corn or grain. Emblements."

Kinney's Law Dictionary and Glossary: "Crop. That which is cropped, cut, or gathered; the valuable part of that which is planted in the earth, as grain, roots, etc."

Amer. & Eng. Encyc. of Law, 2nd ed., vol. 8, p. 302, *sub voc.* "Crops:" "The word 'crop' in its general signification means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stock or root to which it was attached."

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And in the cases:—

*Goodrich v. Stevens* (1871), 5 Lans. N.Y. 230: A crop is primarily some product of the soil gathered during a single year.

See *Mutual Fire Insurance Co. of Montgomery Co. v. Dehaven* (1886), 5 Atl. Rep. 65, 67: "Crops" is sufficient to include crops growing in the field.

In *State v. Crook* (1903), 132 N.C. 1053, "crops" include *fructus industriales* and *fructus naturales*.

In *Dana v. Lewis* (1853), 2 R.I. 492, 493, "crops" includes gathered as well as growing crops.

It will be seen that the word is used in a great variety of senses.

The defendants contend that, in the statute under consideration, a restricted meaning should be placed upon it.

It is admitted that the hay growing on the land, and even as severed from, but still being upon the land, will well come within the meaning of the word, but the *noscitur à sociis* principle is appealed to. "When two or more words susceptible of analogous meaning, are coupled together, *noscuntur à sociis*; they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the less general:" Maxwell on Statutes, 3rd ed., p. 461. Many illustrations of this principle are given in the authorities, shewing its application in determining the meaning of a word by reference to the context. And it is argued here that an examination of the other words in immediate connection with the word "crops" will shew that a restricted meaning must be given to the word in this statute. It is argued that the language being "crops, lands, fences, plantations, or buildings and their contents," all the rest of the words except, indeed, "their contents," refer to something of a permanently fixed nature, something not movable from place to place at will, something which cannot in the nature of things be got or kept out of the way of danger from fire from locomotives, and as to the contents it would be unreasonable to say that a building should be paid for and its contents not.

The principle appealed to does not go so far; it is but a particular case of "those principles which universally obtain that Courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party,

and, with a view to so doing, will examine carefully every portion of the instrument:" Broom's Legal Maxims, 7th ed., p. 435. See *supra*.

The application of this principle in most of the reported cases is made where a general word or phrase, following an enumeration of more particular words or phrases, the well-known "*ejusdem generis*" cases, or where a word of large meaning precedes words of more restricted meaning, and is by the effect of such later words considered to be limited in its meaning and application. Instances of the former are frequent and well known, and perhaps the growth or extension of the doctrine has received a check by such cases as *Anderson v. Anderson*, [1895] 1 Q.B. 749,—and see *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143. The latter aspect of the rule is exhibited in such cases as *Kearns v. Cordwainers' Co.* (1859), 6 C.B.N.S. 388, in which the words following came up for consideration: "None of the powers by this Act conferred . . . shall extend to take away, alter or abridge any right, claim, privilege, franchise, exemption or immunity to which any owners or occupiers of any lands . . . on the banks of the river . . . are now by law entitled . . ." It was held that the rights and claims saved were simply those of such owners or occupiers as such owners or occupiers, not such as they might have as members of the general public. So, also, in *Shuttleworth v. LeFleming* (1865), 19 C.B.N.S. 687, the words were, "right of common or other profit or benefit to be taken and enjoyed from or upon any lands." It was argued that the general phrase "right of common" included—as no doubt it is wide enough to do—a right of common in gross, but the Court of Common Bench held, from a consideration of the remainder of the statute, that such meaning was in this statute (2 & 3 Wm. IV. (Imp.) ch. 71) excluded; and that only those usual rights of common and profits *à prendre* which are in some way appurtenant to the land and limited to the wants of the dominant tenement are included. Cf. *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Webb v. Bird* (1861), 10 C.B.N.S. 268. In *Regina v. Sanders* (1839), 9 C. & P. 79, the statute against breaking into shops (7 & 8 Geo. IV. ch. 29, sec. 15) was under consideration. That statute provided, "that if any person shall break and enter any shop, warehouse, or counting house, and steal any chattel, etc.," he should be liable to be transported for life. The prosecutor sold coal, and was also a black-

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smith; the place from which the coal was stolen was alleged to be a shop to which persons went who bought it, this shop being a room behind the blacksmith shop. Alderson, B., said: "To come within the provision of these Acts of Parliament, the place must be more than a mere workshop, it must be a shop for the sale of articles; a workshop, such as a mere carpenter's shop or a blacksmith's shop, would not, I think, be within the Acts." So the wages of a collier are not within the meaning of the words "salary or income" in sec. 53 of the Bankruptcy Act of 1883, as they are not "income" *ejusdem generis*, with salary: *In re Jones, Ex p. Lloyd*, [1891] 2 Q.B. 231.

I do not cite any further cases, though I have read all those referred to in Broom, Maxwell, and Hardcastle. I do not find any case quite in point. It seems to me that the argument based upon this principle is not well founded. The section cannot have been intended to give the word "crop" the single meaning of "growing crop," "crops in and attached to the freehold." The word "land" would cover this meaning if used alone, as indeed the word would, used alone, cover fences, plantations, buildings. There would be no object in using the word "crops" at all if nothing more was meant than "growing crops." But once the crop is severed (and, as has been said, it is admitted that the word in the statute covers it in its severed state), at what stage does the chattel cease to be "crops?" Not when shocked up in stacks or shocks. It surely would be absurd that wheat lying on the ground in sheaves as it comes from the binder should lose its protection and statutory name when it was shocked, or when made into a stack in the field, or when threshed, say in the field. I can understand and follow an argument that so far the wheat is "crops," but that when drawn away from the land which produces it, it should cease to be within the meaning of the statute and then be brought within the category of ordinary chattels. It may well be asked why a load of wheat being drawn to market or standing at the door of a warehouse should be protected if a load of flour from a miller or a load of cloth from a weaver is not. But it may be replied, "why should wheat growing in or piled on a farm be protected, and the cow or horse feeding in it, not?" The Parliament of Canada have abandoned, or it would be better to say have not adopted, the broad language of the statute in the States of the American Union. "Property,"

as such, is not protected, but only certain particular and particularized kinds of property. These particular kinds of property are selected for special treatment, and, whatever anomalies result, we must interpret the words used in describing such kinds of property by the ordinary rules of interpretation. The fact that an interpretation in any given sense of the statute would lead to anomalies does not assist or tell against such interpretation—the statute is itself anomalous.

A farmer is reaping his field of wheat with a binder drawn by two horses; he has left his coat with his purse in the pocket hanging upon a tree in the plantation in the corner of the wheat field; his other farm stock and implements are at the farmstead; some colts and calves tethered within the stable and byre, some with their dams running free in the barnyard. He has bought a quantity of lumber to build fences; some of this is lying in the barn, some yet by the roadside piled up, and some already made into fences. A fire starts from a passing locomotive in the overripe grain, spreads so quickly that there is no time even to save the coat and pocket-book; the horses drawing the reaper are scorched and perhaps blinded by the sparks and cinders, the reaper injured or reduced to scrap iron, the barn and outbuildings take fire and are destroyed, the animals in the barnyard are injured or killed, the fences are burned as well as the lumber on the side of the road. No negligence can be proved against the railway company. What follows?

The wheat is a "crop," it must be paid for; the trees in the corner are a plantation, they must be paid for; the barn and outbuildings must be paid for, they are buildings; fence material within the building must be paid for, that is "contents;" so also the colts and calves within; the fences burned must be paid for. But, while the wheat must be paid for, not so the reaper or the horses engaged in cutting. They are not crops. The trees in the plantation must be paid for, but not the coat hanging on it; the colts and calves in the building, but not those in the barnyard; the fence *in situ* and the fence material in the barn, but not that on the roadside; while, if the farmer himself suffer personal injury he cannot recover; and if he die, his widow has no relief—at least financially from the company.

Again, a shopkeeper has received his winter goods at the station. Much of these he has got into his shop; some are still lying in his

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yard, and some are upon his drays, but not unloaded. Of his winter fuel, some he has in his basement, but some of his cordwood is still in the street and some of his coal in his yard. A fire takes place from the sparks from a locomotive, without negligence proved. What follows? His shop and the goods therein, including fuel, must be paid for, but the goods in the yard and those on the drays, the drays themselves and the horses, the wood and coal without, the railway escapes liability for. And, as before, he can recover nothing for personal damage to himself or his family. And why? Because Parliament so wills. We cannot here go behind the will of Parliament and ask, "Why did Parliament so will?" *Sic volo, sic jubeo.*

"Crops," then, being selected as one of such favoured classes of property, and the word clearly not being restricted in meaning to "growing crops," we need not fear to apply the word whenever it is fairly applicable, and not be deterred either by fear of anomaly or apparent absurdity arising from treating one species of property differently from another.

It seems to me that a crop of wheat does not lose its character of "crops" at least until it has passed out of the ownership of the grower, or has been converted into something else, such as flour; and that whether the wheat remain on the land or farm where grown, or be in the process of removal, or have been removed. A crop of hay does not cease to be "crops" at least until the hay leaves the ownership of the grower, or be changed into something else, whether that be the filling of a mattress, or what not. It may well be that *quoad* the miller or other purchaser, the wheat is not "crops;" as regards the mattress maker or other purchaser the hay is not "crops;" but in either case, mere articles of commerce not considered by Parliament necessary to be protected unless within a building. But I cannot see that, as to the grower at least, wheat or hay loses its property as "crops" so long as he owns it and it remains in substance unchanged.

And, after all, in all cases of interpretation of ambiguous statutes, the balance of hardship or inconvenience must be considered; if upon one construction the balance of hardship or inconvenience would be strongly against the person whose property is to be protected, then that interpretation should not be adopted if at all to be avoided: see *per* Lord Selborne,

L.C., in *Dixon v. Caledonian and Glasgow and South Western R.W. Cos.* (1880), 5 App. Cas. 820, at p. 827. Just consider the relative situation of railway company and grower of farm products. The railway company run the line where they will; they use engines filled with fire—to the advantage of the public, it is true, but for the advantage of the company primarily and ultimately. If a fire take place without negligence there are two innocent parties, of whom one must suffer. It is elementary equity that, of two innocent parties, he should suffer who, however innocently, brought about the loss. Why should not the railway company suffer the loss? The only reason (before the statute) was that the Courts had laid it down as a principle of law that, unless negligence could be proved against the railway company, they escaped—the other innocent party, who had nothing to do with the cause of the loss, and who made nothing by the use of the dangerous element, had to bear the loss without redress. From day to day he could contemplate a railway company making money by the use of a dangerous machine, and know that he could do nothing to prevent such use, but that if any damage were caused to him—if he were ruined by this machine, the railway company could legally disregard his claim for compensation. And all that is so yet, except as to the specially mentioned kinds of property, a state of affairs which, it may be, calls for parliamentary interference. That is, of course, for Parliament to decide, not for the Courts.

But as to the kinds of property which Parliament has taken under its protection, I venture to think that, the rule of law referred to having been got rid of, there is no reason for relaxing the salutary principle—that he who, voluntarily or involuntarily, does the act occasioning damage, must suffer rather than the innocent party, who, not participating, has been injured by such act.

The balance of convenience, in my view, enormously preponderates in favour of the innocent injured. I had almost said that common justice and fair play demanded such a conclusion. The rule in the civil law is in that sense; and the state of the authorities before the *Vaughan* case was such as (*me jūdice*) would have justified a conclusion in the same direction. However that may be, the doctrine there laid down is too well established to be questioned in this Court. And so in respect of all else than the specified kinds of property, the innocent party who receives no advantage

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from the engine which sends out fire must bear his loss without redress against those who use and profit by the engine.

I am of opinion, from a consideration of the statute, that the definition of the word "crops" in the statute must be at least as wide as the following: "Vegetable productions, whether annual or more frequent, not altered in substance and still owned by the owner or occupant of the land producing them." This would include *fructus naturales* as well as *fructus industriales*, hay and grass as well as wheat and potatoes; it would include apples and exclude apple trees, include currants and exclude currant bushes, include strawberries and exclude strawberry plants, include all kinds of grain and exclude an ice crop, the crop of lambs of Norfolkshire and Mrs. Beecher Stowe's crop of noisy children.

I am therefore of opinion that the first ground failed.

Nor am I able to give effect to the second argument.

I adopt the reasoning of the Connecticut Court in *Grissell's* case and of the Missouri Court in the *Campbell* and *Adams* cases, and do not think that the earlier Maine decisions are to be followed.

But I am unable to see how it can be said that such property is not insurable by the railway company—there need be no more difficulty in such insurance than any other general insurance. Such insurance, as it is well known, is effected by railway companies upon the contents of their freight sheds, which change from time to time, or such general insurance as was in question in *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.* (1906-1907), 39 S.C.R. 405, 11 O.L.R. 465, 9 O.L.R. 493.

There is nothing which can be called contributory negligence here. In that respect I adopt the language of the Colorado Court in the *Williams* case, 3 Colo. App. 526. See also *Derinzy v. Corporation of Ottawa* (1887), 15 A.R. 712, at p. 717, *per* Hagarty, C.J.O.: "Nor can I accede to the argument that the plaintiff can be barred by his voluntarily coming to reside and build a greenhouse, etc., on land known to be previously liable to be flooded."

Upon all grounds taken, the appeal should be dismissed, and with costs.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

The defendants by leave appealed to the Court of Appeal, and the appeal was argued on February 1st, 1909, before Moss, C.J.O., d OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*D. L. McCarthy*, K.C., and *W. E. Gundy*, for the defendants, appellants, stated that this was the first case on the point involved of the construction of sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, and contended that by including "crops" in that section, the intention was to benefit the farmer; the "crops" must mean something growing on the land or on the adjoining land; that no insurance company would or could cover a case of this kind where the "crop" is brought from a distance; that the case of *Grissell v. Housatonic R. Co.*, 9 Atl. Rep. 137, 54 Conn. 447, supports the view that the word "crops" should be read in connection with the accompanying words, "lands, fences, plantations, or buildings;" that when removed from the land where it was grown the hay ceased to be a crop within the meaning of the section, the intention being to benefit farmers, not to benefit people bringing the dangerous material up to the railway line. They also referred to Broom's Legal Maxims, 6th ed., p. 543; and Murray's Oxford Dictionary, *sub voc.* "crops."

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*A. B. Carscallen*, for the respondent, referred to the definition of crops in the Standard Dictionary and in Webster's Dictionary as shewing that it applied to the product of the soil even after removal; that no doubt the crop here would have ceased to be a crop when it was being used as fodder or when it had become a mattress, but that mere removal could not be the test. He referred to the American and English Encyc. of Law, 2nd ed., vol. 13, p. 430, under the title "fires;" *Dawson v. Midland R.W. Co.* (1872), L.R. 8 Ex. 8; *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.*, 11 O.L.R. 465, 39 S.C.R. 405.

*McCarthy*, in reply, contended that "crop" in its ordinary acceptation meant crop on the farm; that when it had left the farm and become merchandise it ceased to be crop; that the section in question does not contain the word "property," which is found in some American statutes; and that the only case in which movable property would be covered by the section would be if a crop were put into a building, and the defendants rendered liable under the word "contents" in the section.

April 5. GARROW, J.A.:—Appeal by the defendants from a judgment of a Divisional Court affirming the judgment at the trial of Teetzel, J., in favour of the plaintiff.



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The only point involved is the proper construction of sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, which says that when damage is caused to "crops," lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage.

On March 9th, 1908, a quantity of hay or marsh grass, as it is called, belonging to the plaintiff, was destroyed by fire which escaped from a locomotive engine then being used by the defendants in the yards of the Wallaceburg Sugar Co. The hay was grown on lands in the township of Dover, at some distance from the line of railway—exactly how far is not stated, but it was certainly off the line of railway, and far enough away to have made it impossible that fire from a locomotive engine could have directly reached it there. The plaintiff had sold the hay, and had, for shipping purposes, teamed and placed it alongside the defendants' railway track, where, in the ordinary course of business, the defendants' locomotive engine was shunting when the fire occurred. Negligence is not alleged.

Teetzel, J., construed the statute as applicable to "crops" generally, wherever grown, if consumed by fire escaping from a locomotive engine. And this construction, after much examination of American authorities, was adopted by the Divisional Court, a conclusion with which I find it quite impossible to agree.

The question, of course, is what did Parliament intend by the language used? Did it intend to cast upon the steam railways of the country the burden of insurers against fire of everything movable which by the dictionary is called a "crop," no matter where grown, whether in Canada or elsewhere, which the owner for his own convenience chooses, without the knowledge or consent of the railway, to place upon anybody's land within the danger zone? Or did it mean to protect the husbandman in the use and cultivation of his lands lying along the route of the railway, from the inevitable danger to his "crops, lands, fences, plantations, or buildings and their contents," from escaping sparks, which risk, since the decision in *Vaughan v. Taff Vale R.W. Co.*, 5 H. & N. 679, he was compelled to bear without redress unless he could prove negligence?

Surely the latter was the plain and obvious intention. It was

not the intention to cover all property, but only the property expressly enumerated, all of which, unless it be "crops," has the quality of fixity, or attachment to the land along the route of the railway.

No reason is suggested, and none occurs to me, why "crops" in general, and apart from the place where they were grown, should enjoy a special protection not afforded to other inflammable property. But there is, I think, good reason why "crops" grown on land upon and along the route of a railway, and therefore in constant danger from its operation, should while growing, and even when grown and reaped, while still on the land, be protected, at least to the same extent as the other named property, such as fences, plantations, buildings, etc. They are all, I think, in precisely the same category, and the maxim *noscitur à sociis* clearly applies.

The statute does more than merely enumerate the kinds of property intended to be protected, for it gives to the railway company an insurable interest in the property for which under the statute it is made responsible. And upon the question of intention this is, I think, of considerable importance, because it was clearly intended that the whole risk might be insured against, and it is, therefore, quite legitimate to consider the matter from the insurance standpoint in a search for the true intention, always, of course, having regard to the language of the statute. Insurance, to be useful, must, it is needless to say, be made in advance of the loss. The subject matter need not, it is true, be fixed property, for movable property may be, and constantly is, insured, although usually, I think, affixed by description as at some particular place, or else in transit. The description of the property to be insured—that is, where it is and what it is—is the basis upon which the premium is calculated and the contract made. Chattels described as at a particular locality would cease to be covered on removal elsewhere: see *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498, because, as pointed out by Lord Chelmsford at p. 505, "an insurance against fire necessarily has regard to the locality of the subject matter of the policy, the risk being probably different according to the place where the subject matter of the insurance happens to be." A crop grown on lands along the route of the railway would certainly cease to be covered if removed to a place beyond the route of the railway. And, conversely, after the contract was made, and except upon consent or by virtue of

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special terms in the contract, the risk could not be materially increased by the assured bringing into the territory or place intended to be covered a crop not grown there. And if the assured might not so increase the risk, there would be still less justification for permitting, or for supposing that Parliament intended to permit, a third person, not a party to the agreement at all, to do so. Any other construction would lead to extraordinary results. A farmer having a farm miles away from the railway might rent an acre of land on a railway siding in the village, and team and stack there ready for shipment a thousand dollars' worth of hay, which, without expense or trouble to him, would be practically insured for as long as he chose to leave it there. And, if not consumed, he might ship it by the railway to a distant city, for sale, and again unloading it near the track obtain the same ample protection. For, by the conclusion arrived at in the Courts below, as long as the article can be called a crop, and however often it may be moved from place to place, and however far it may travel in Canada, it will always, when and as often as it is placed along the route of a railway, be automatically protected by the statute, a result which, in my opinion, was never intended, and to which the language in no way compels. The language may not be as clear and distinct as it could be made, but, having regard to what was the law before the change, to the evil intended to be remedied, and to the language actually used for the purpose, and reading the whole section together, as of course should be done, I cannot say that I have any doubt that the real intention, and the proper construction, is the limited one which I have pointed out; in other words and to repeat, that "crops" means crops grown or growing upon lands upon and along the route of the railway, and actually situated upon such lands when destroyed. The change was clearly made for the benefit of the owner of such lands in respect of his crops growing or grown upon such lands, and not for the benefit or protection of any one else who might happen to own crops grown outside but brought within the protected territory.

For these reasons I think the appeal should be allowed, upon the terms contained in the order granting leave to appeal, namely, that the defendants shall bear their own costs of the appeal and shall also pay the costs of the respondent. And the action must be dismissed with costs, including the costs of the motion before the Divisional Court.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

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MEREDITH, J.A.:—In seeking, in such a case as this, the true meaning of a word so well known, and of such wide and varied use—and probably abuse—as that in question, the most useful dictionary is, perhaps, the enactment in which it is used, aided by a knowledge of what the law was before the introduction of the clauses in question, and the mischief which the introduction of them was intended to remedy.

Prior to such introduction, railway companies were, very reasonably, held liable for injury caused by fire from their locomotive engines, when they were guilty of some negligence which caused the injury, and such liability still continues. But the difficulty of proving such negligence was sometimes great, and probably sometimes impossible, and a demand for a parliamentary extension of such liability was met by the enactment in question.

The plain effect of the legislation is to make railway companies liable for injury so caused, whether there is or is not negligence on their part; but that liability is plainly restricted to certain persons and certain classes of property. As to such it does away with the need of proof of negligence, and, in effect, puts the parties in the same position as if proof of the cause of the injury were indisputable proof of negligence; it does not make a contract of insurance between such owners of such property and the company.

The classes of property to which it is confined are “crops, lands, fences, plantations, or buildings and their contents.” The persons who were in the contemplation of Parliament were the owners of property along the line or tracks of the railways, whose property might be endangered by the running of such engines. This is made very plain by the clause giving the companies an insurable interest in “such property upon or along the route.”

The “marsh grass” in question was grown, harvested, and baled, many miles away from the railway, and could not during any of these processes have been deemed within the provisions of the enactment, it was so absolutely and entirely without the danger zone, and so far removed from the “route” of the railway.

The question, then, is: did it acquire the character of “crops,” within the meaning of the enactment, by reason of the owner bringing it to the “route,” and within the zone of danger, for the sole purpose of delivering it to a purchaser to whom it had been



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sold? I cannot think that it did. I cannot think that the plaintiff was one of those owners for whose benefit the enactment was passed, nor can I think that a crop which has been converted into a well-known article of merchandise—baled, dried swamp-grass for mattresses—and already sold as such, and transported many miles on its way to the purchaser, can be considered to be within the meaning of the words, “crops, lands, fences, plantations, or buildings and their contents,” unless contained in a building, which it was not.

In the absence, then, of proof of negligence, the defendants cannot be held liable; and no claim based upon negligence was made, but, on the contrary, any such claim was plainly repudiated by the plaintiff at the trial.

Having reached this conclusion on this branch of the case, it is not necessary to express any opinion upon the question of contributory negligence, or any like defence.

I would allow the appeal and dismiss the action.\*

A. H. F. L.

\* See now 8 & 9 Edw. VII. ch. 9, sec. 9 (D.):—Sub-section 1 of section 298 of the said (the Railway) Act is amended by striking out the words “crops, lands, fences, plantations, or buildings and their contents,” in the first and second lines thereof, and substituting therefor the words “any property,” and by inserting after the word “recoverable,” in the 9th line thereof, the words “under this section.” Provided further that the company shall, to the extent of the compensation recoverable, be entitled to the benefit of any insurance effected upon the property by the owner thereof. Such insurance shall, if paid before the amount of compensation has been determined, be deducted therefrom; if not so paid, the policy or policies shall be assigned to the company, and the company may maintain an action thereon.

## [DIVISIONAL COURT.]

LEHIGH COBALT SILVER MINES CO. v. HECKLER.

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Oct. 24.

*Promissory Note—Irregular Endorsement—Liability by Signature—Bills of Exchange Act.*

On the back of certain promissory notes given by S. to the order of H. appeared the signatures of K. and B., underneath the words, "We guarantee payment of the within note:"—

*Held*, that K. and B. were liable as endorsers.

*Locke v. Reid* (1842), 6 O.S. 295, not followed as no longer representing existing law, having regard to the course of decision, and the effect of sec. 131 of the Bills of Exchange Act.\*

APPEAL by the defendants from an order of the mining commissioner made on the basis of a settlement between the parties. The main point in the case, and that on which the judgment of the Court turned, was as to the validity of certain notes given by one Shimer to the order of the defendant C. F. Heckler, on the back of which appeared the signatures of Kickline and Blake, underneath the words, "We guarantee payment of the within note."

The appeal was argued on the 19th October, 1908, before BOYD, C., MAGEE and LATCHFORD, JJ.

J. M. Clark, K.C., for the appellants, contended that the guarantors were not liable under the law of Pennsylvania, where the notes were payable, and that they were not liable as endorsers: *Locke v. Reid* (1842), 6 O.S. 295.

Grayson Smith, for the respondents, contended that the guarantors were liable both in that capacity and as endorsers, and that, in any case, the plaintiffs did not agree by the settlement to give negotiable notes.

October 24. BOYD, C.:—We all agree that the judgment should be affirmed, and with costs. It appears to me that the notes given by Shimer to the order of Heckler, with the signatures of Kickline and Blake on the back, underneath these words, "We guarantee payment of the within note," are valid securities. These notes are precisely what was called for in the terms of the settlement. If their engagement amounts to no more than a

\* R.S.C. 1906, ch. 119, sec. 131. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers.

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guarantee, there is sufficient evidence of consideration in the giving of time to bind them as guarantors; but, having regard to the Bills of Exchange Act and the course of decision, I am of opinion that Kickline and Blake would be liable as endorsers. *Locke v. Reid*, 6 O.S. 295, can no longer be taken to represent existing law. Reading that case and the case of *Singer v. Elliott* (1888), 4 Times L.R. 524, and the commentary of Strong, C.J., on that decision, and the effect of the statute (now sec. 131 of R.S.C. 1906, ch. 119), in *Robinson v. Mann* (1901), 31 S.C.R. 486, I think the fair conclusion is that *Locke v. Reid* is no longer law.

MAGEE and LATCHFORD, JJ., concurred.

G. G.

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[DIVISIONAL COURT.]

MCLEOD V. CANADIAN NORTHERN R.W. CO.

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*Railway—Fences—Statutory Obligation as to—Gap Left in Fence—Animals—Injury to—When “at large”—Contributory Negligence—Proximate Cause—Cause of Action—Lands Inclosed and either Settled or Improved—Onus of Proof—Dominion Railway Act, secs. 254, 294, 427.*

The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they had left a gap, through which the horses strayed on to the track, where they were run down by a train and killed:—

*Held*, that the horses were not “at large” within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as “suffering” their animals to “enter upon” the railway, and so losing their right of action under sec. 295 (e).

(2) There is no express provision in the present Railway Act equivalent to sec. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. ch. 24, sec. 9 (D.), under which it was decided in *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute.

(3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by sec. 254 of the Railway Act to “erect and maintain upon the railway” fences “suitable and sufficient to prevent . . . animals from getting on the railway,” for breach of which duty a statutory right of action against the company is given by sub-sec. 2 of sec. 427 of the Act, to any person injured, for the full amount of damage sustained thereby.

(4) *Primâ facie* the fence was erected by the company in accordance with their statutory obligation to do so where the lands through which the railway passes are "inclosed and either settled or improved" (sec. 254, sub-sec. 4); and the onus lay on the defendants to shew that at the time when the fence was erected, it was not "required" by the Act.

*New Brunswick R.W. Co. v. Armstrong* (1883), 23 N.B.R. 193, approved and followed.

Judgment of CLUTE, J., affirmed.

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THIS was an appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiffs, in an action tried with a jury at Bracebridge, on the 7th May, 1908, for damages for the killing and injury of horses upon the defendants' railway.

On the findings of the jury a verdict was given for the plaintiffs for \$590 and costs, from which the defendants appealed to a Divisional Court.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ., on the 20th November, 1908.

*R. B. Henderson*, for the defendants. The plaintiffs' land was not inclosed within the meaning of the statute, and there was no liability on the defendants to fence. There is no evidence of how the horses got on to the track, and if they did get there in the manner alleged by the plaintiffs, it was by means of a road which the defendants had allowed to remain there for the convenience of the plaintiffs, who cannot now be heard to assert that it should not have been there. The plaintiffs' cattle were "at large" within the meaning of sub-sec. 4 of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, and the defendants are entitled to set up the defence of contributory negligence, which is clearly established by the evidence. The case of *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, by which the trial Judge held he was bound, was decided under sec. 16 of the old statute, 42 Vict. ch. 9, as amended by 46 Vict. ch. 24 (D.), but there is no equivalent to that section under the present Railway Act. It was first changed by 53 Vict. ch. 28, sec. 2, for which was substituted sec. 237, sub-sec. 4, of the Railway Act of 1903, under which the owner cannot recover damages if negligence is proved against him. A similar provision is made in sec. 294 of the present Act. The decision in *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63, was *obiter* and not binding on this Court. The defendants' point is that under the present law no change is made from the ordinary law as to contributory negligence in favour of cattle owners.



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*J. B. Clarke, K.C.*, for the plaintiffs. The plaintiffs were entitled to pasture their horses in the field leased by them adjoining the defendants' railway, and there was no way in which they could have got to the tracks except through the gap left by the defendants in the railway fence. It was the duty of the defendants under the statute to construct and maintain on their railways proper fences, gates, etc., and in case of breach of that duty, a right of action is given against them: R.S.C. 1906, ch. 37, secs. 254, 427. The neglect of this duty was the proximate cause of the accident; therefore the question of contributory negligence in turning the horses in question into the pasture field which was not fenced off from the railway does not arise. The following cases were referred to: *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724; *Dunsford v. Michigan Central R.W. Co.* (1893), 20 A.R. 577; *McMichael v. Grand Trunk R.W. Co.* (1886), 12 O.R. 547; *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63. Section 294, sub-sec. 4, relied on by the defendants, does not apply to the present case: *Lebu v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 590; *Bacon v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196; *Arthur v. Central Ontario R.W. Co.* (1906), 11 O.L.R. 537; see also *Canadian Pacific R.W. Co. v. Carruthers* (1907), 39 S.C.R. 251.

December 18. *BOYD, C.*:—Upon the findings of the jury the horses of the plaintiffs were killed or injured because the railway company, having fenced along the field occupied by the plaintiffs adjoining the track, left an unfenced place or gap in the fence, through which the horses strayed from the pasture field, to and along the track, and while thus on the property of the railway company were run down at night by a train.

This happened on the 26th June, 1907, at a time when the new revised statutes of Canada had come into effect, that date being the 31st January, 1907 [6 & 7 Edw. VII. ch. 43 (D.)]

The special sections which have to be considered in this appeal are secs. 254 and 294. After the argument there were left two contentions, which are now to be disposed of: first, and the one most strongly urged, that the plaintiffs were, on their own shewing, guilty of negligence or contributory negligence in turning their horses into a field when they knew there was an open and unprotected gap in the railway fence; and second, but less strongly, that

under the statute the company were exempted from putting up or keeping up a fence in the locality and at the plaintiffs' farm.

Upon the first, the principles laid down in *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724, are against the contention, if that decision is applicable to the present statute law. That case was decided in 1886 under 46 Vict. ch. 24, sec. 9, providing for amendment of sec. 16 of the Consolidated Railway Act of 1879, and giving a new sec. 16, of which sub-sec. 2 provides that if the fences required by the Act are not duly made and maintained the company shall be liable for all damage done on the railway by their trains to the cattle, etc., of the occupant of the land in respect of which default has been made in the fencing. It was held, under this state of the law, that the question of contributory negligence did not arise, because the company were made liable for all damage to cattle until the fences should be built which ought to have been built: *Patterson, J.A.*, at p. 733. And *Osler, J.A.*, said, at p. 737: "As at present advised, my opinion is that where the proximate cause of the damage is the omission of the company to make or maintain fences as required by the statute, the question of contributory negligence in turning the animal into a field not fenced off from the railway would not arise. The plaintiff had the right to use the field, and the duty to fence as against him being absolute, I cannot see that he would owe any legal duty to them to keep his animal from the railway track."

But this provision has, after certain amendments in form, substantially disappeared from the new statute, and a different provision has apparently been "substituted" for it. After passing through modifications in 1888, (51 Vict. ch. 29, sec. 194 (3)), and in 1890, (53 Vict. ch. 28, sec. 2), it was replaced in the new Railway Act of 1903 (3 Edw. VII. ch. 58) by sec. 237, under the sub-heading "animals at large," sub-sec. 4 of which sec. 237 has a note appended, "Sub. for 53 Vict. ch. 28, sec. 2," meaning, I suppose, substituted for the earlier provision which had been classed under the general head of "fences and cattle guards."

The new sub-section provides that when any cattle, at large upon the highway or otherwise, get on the property of the company and are killed by a train, the owner shall recover the amount of the loss against the company, unless the company, in the opinion of the jury, establish that the animal got at large through

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the negligence or wilful act or omission of the owner, but the fact that the animal was not in charge of some competent person shall not for the purposes of the sub-section deprive the owner of his right to recover. This enactment applies to "animals at large," and it would seem to me not aptly expressed if it is intended to relate to animals grazing or feeding at will in the field of the owner adjoining the track. Treating this appended note as a legislative declaration, though I do not decide that it is so, it appears evident that the substituted section is addressed to the case of "animals at large," as is expressed in the sub-heading of the section. I do not read it as covering the case of animals, not at large, but grazing or feeding in the owner's field or premises adjoining the track. The former section (53 Vict. ch. 28, sec. 2), was classed under the general head of "fences, gates, and cattle guards." There is no equivalent for this section in the new statute of 1903, for the section said to be substituted is of different scope, as I have indicated. In the Act of 1903, the sections grouped under the heading of "fences, gates, and cattle guards" impose the obligation upon the railway company to erect and maintain fences upon the railway, sufficient and suitable to prevent cattle and other animals from getting on the railway, and this applies not only to the cattle of adjoining owners, but to all cattle getting on the track through insufficient fences.

At the time of the accident, sec. 294 of R.S.C. 1906, ch. 37, was in force, of which sec. 237 of the Act of 1903 is the foundation. Various amendments are found in the revised version, which do not alter its character as a whole, though the new sub-heading has only the word "animals." The inherent meaning, as shewn by the words "at large," used expressly or by implication, throughout and in each of the sub-sections, restricts it to the case of "animals at large." The case now in hand of cattle on the premises of the owner adjoining the track is not expressly provided for anywhere in the new statute as revised. The negligence of the owner provided for by the section is when his animals get at large or are at large, and do not cover, and are not meant to cover, the case of an owner using his pasturing land and field in the usual manner, for the purpose of feeding and keeping his cattle. In like manner, I do not construe that part of the next section, R.S.C. 1906, ch. 37, sec. 295 (e), which takes away the right of action if the owner "suffers" the animal to enter upon the railway, and within the fences, etc., as

applying to this case; for that contemplates the case of a railway company having provided proper fences and safeguards, and the owner by his own omission depriving himself of the proper protection thus provided by the company.

The result then arrived at is this. It seems plain that the old provision under which *Davis v. Canadian Pacific R.W. Co.* was decided has been abrogated, and there is, in my opinion, no equivalent express provision to be found, and sec. 294 does not apply to this case. What then? Not the escape of the company from liability, because sec. 254 exists, which provides for the maintenance of fences on each side of the railway, and these to be suitable and sufficient to prevent cattle and other animals from getting on the railway: sub-sec. 3.

At the time of the construction of the railroad in the fall of 1906, the statute then in force was the Act of 1903, sec. 199, but that is the same (with one slight correction) as in the R.S.C. 1906, ch. 37, sec. 254. The provision for fencing as to railways, from the very outset of railway legislation, has always been held to be particularly for the benefit of adjoining proprietors.

In one of the first reported cases as to railway fencing, Parke, B., says: "If the cattle had an excuse for being there, as if they had escaped through defect of fences which the company should have kept up, the cattle were not wrong-doers, though they had no right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case." *Sharrod v. London and North Western R.W. Co.* (1849), 4 Ex. 580, at p. 586.

In a later case, *Fawcett v. York and North Midland R.W. Co.* (1851), 16 Q.B. 611, the horses strayed from the plaintiff's field into a highway, and thence through a gate left open, which should have been closed by the company, on to the track. The defence was that the horses got out of the field and strayed away through the fault of the owner, and but for that they could not have been on the railway. It was held that the owner had a right to leave his field open upon the highway, that the horses, as against the company, were lawfully upon the highway, and it was the obligation of the company to keep the gates closed as against such horses. Commenting on this case, it was put briefly by Jervis, C.J.,

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thus, in *Manchester, etc., R.W. Co. v. Wallis* (1854), 14 C.B. 213, at p. 222: "There, the company were under a positive obligation to keep the gate closed. What right had they, then, to say the plaintiff's cattle were not lawfully on the highway?" Our Courts have followed these authorities, and citations are useless, except as to the latest case, *Canadian Pacific R.W. Co. v. Carruthers*, 39 S.C.R. 251.

The obligation now on the company is the statutory duty to fence in cases where fencing is required by the statute, and if there is a breach of duty in that respect a statutory right of action is given by sec. 427 of R.S.C. 1906, ch. 37, which provides that in any case of omission to do any act, matter, or thing required to be done by the company, the company shall also, and in addition to any penalty, be liable to any person injured by such omission for the full amount of damages sustained thereby: *Le May v. Canadian Pacific R.W. Co.* (1889), 18 O.R. 314, affirmed on appeal 17 A.R. 293, and *Curran v. Grand Trunk R.W. Co.* (1898), 25 A.R. 407.

As to the first point, therefore, I think the principle of the decision in *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724, should be applicable to the present situation. It cannot be said that the owner's allowing his horses to feed on his own land (owned or leased) was equivalent to his suffering them to enter upon the railway premises, within the meaning of these words as used in sec. 295 (e). If it is to be so considered, then it was not done "without the consent of the company," who left the gap in the fence, knowing that the horses in the field might stray through on to the track. The negligence of the owner referred to in the 4th clause of sec. 294 is really applicable to cases where the animal is "at large" and not "at home." I see no evidence of negligence on the part of the owners to be submitted to the jury; no contributory negligence on their part which should involve a nonsuit. The duty of the company to fence (speaking now without reference to sec. 254, sub-sec. 4) was absolute, and as against the company the animals were lawfully in the field.

The defence of negligence does not arise upon the facts; the plaintiffs were using the field as owners or occupiers lawfully. They had the right to turn out their horses there to feed and stay, though they were aware of the gap in the company's fence. *Quoad* the company they were not called upon to keep their horses shut

up or under care day and night. No such duty existed on their part to the railway company, and no negligence can arise from their acting as any reasonable farmer would act as to his cattle on his own property. But blame rests on the company because they disregarded the obligation to fence imposed by the statute.

Next, as to the fencing question. The evidence in this case shewed that when the railroad was constructed in the fall of 1906 fences were erected in this locality by the company along the track. Some lots on both sides were then fenced, cleared, and occupied; how far the fencing extended does not precisely appear, but general evidence was given of farms and houses, station, store, and post office in the neighbourhood, and clearances on the lots. Taking into account the conduct of the railway company in putting up the fence in question, it cannot be said there was not evidence to go to the jury to justify their response to the question submitted. It was framed in the terms of the statute thus: "Were the lands through which the railway passed in the locality in question inclosed and either settled or improved?" Answer, "yes." It is true that the charge of the learned trial Judge was not so explicit on the point as it might have been. He did not pointedly call the attention of the jury to the true alternative of the statute that the locality should be either (1) inclosed and improved, or (2) inclosed and settled, and he spoke in one place as if the statute would be satisfied if the place was land improved and settled, but later on he reiterates the words of the statute, that the lands through which the railway passed in the locality should be inclosed, and either settled or improved.

But I do not think this method of direction should involve a new trial, considering the circumstances. The fence on each side of the track, before these lots, being put up by the railway company, leaving the gap as they did for the convenience of persons going to and from the post office and elsewhere, and being so put up at the time of the construction of the road, it is not to be assumed that this fencing was done without its being "required" by the statute. *Primâ facie* the company were constructing the road in the fall of 1906 with this fencing according to their statutory obligation, and I think the onus rests on the company to shew that the fence so made was a work of supererogation. If the situation was such at the time of erection that fencing at that place was

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not required by the Act, that was for the company to shew, in view of the evidence given pointing in a contrary direction. This was the ruling in a much similar case by the full Court in New Brunswick: *New Brunswick R.W. Co. v. Armstrong* (1883), 23 N.B.R. 193, which commends itself to my judgment.

The appeal should therefore be dismissed with costs.

I may just note that the expression in sec. 237, sub-sec. 4, of the Act of 1903, "cattle at large upon the highway or otherwise," which in the revision was changed to "cattle at large, whether upon the highway or not," does in no way enlarge the scope of the section so as to make it applicable to cattle which are not "at large" in the legal sense. Cattle on the lands of the owner are not "at large," but "at home." The effect of the section as to the words "or otherwise" has been discussed in the Provinces: *Daigle v. Temiscouata R.W. Co.* (1905), 37 N.B.R. 219; also in *Lizotte v. Temiscouata R.W. Co.* (1906), 37 N.B.R. 397; so in Manitoba, *Carruthers v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 323, affirmed in the Supreme Court, 39 S.C.R. 251.

Again, the words in the other section as to fencing, which in 1903 (sec. 199 (3)) were thus expressed, lands "not improved or settled and inclosed," and which were clarified in the revision, (sec. 254 (4)), so as to read "not inclosed and either settled or improved," have been the ground of conflicting decisions: see *Dreger v. Canadian Northern R.W. Co.* (1905), 15 Man. L.R. 386, which was not followed in the next year, 1906, in *Schellenberg v. Canadian Pacific R.W. Co.*, 16 Man. L.R. 154. This last was on the same lines as the holding of Mr. Justice Street in *Phair v. Canadian Northern R.W. Co.* (1905), 6 O.W.R. 137, 140, which was accepted in *Daigle v. Temiscouata R.W. Co.*, *ubi supra*, at p. 220. To this interpretation legislative sanction has now been given by the amendment in the Revised Statute, sec. 254 (4).

MAGEE and LATCHFORD, JJ., concurred.

G. G.

[IN CHAMBERS.]

NIXON V. JAMIESON.

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Mar. 6.  
April 14.

*Writ of Summons—Service out of Ontario—Construction of Contract—Place of Payment—Parol Evidence—Admissibility—Con. Rule 162—Conditional Appearance.*

The plaintiff, resident and carrying on business in Toronto, completed, by letter posted there, a contract with the defendants, who resided in Scotland, under which he was entitled to a certain commission on goods sold in Toronto:—

*Held*, that, on the legal construction of the contract, the place of payment was Toronto, and parol evidence was not admissible to shew the contrary, as by proving that the plaintiff had always drawn on the defendants for his commission, and that such drafts had been paid in Scotland; and therefore an order allowing service of a writ of summons out of Ontario was rightly made under Con. Rule 162; but the defendants should be allowed to enter a conditional appearance.

*Blackley v. Elite Costume Co.* (1905), 9 O.L.R. 382, followed.

THIS was an appeal by the defendants from an order of the Master in Chambers refusing to set aside the service of the writ of summons and statement of claim upon the defendants in Scotland, and his order authorising such service.

The motion before the Master in Chambers was made on March 3rd, 1909.

*C. A. Moss*, for the motion.

*T. M. Higgins*, for the plaintiff.

MARCH 6. THE MASTER IN CHAMBERS:—Motion to set aside order for issue of writ, under Con. Rule 162, and service made thereunder.

The affidavit on which the order was granted was to the effect that the defendants were justly and truly indebted to the plaintiff for sales of goods made by him on commission for them; that such sales were made in Toronto, and the said moneys became payable to the plaintiff at Toronto.

This, I think, was sufficient under Con. Rule 163.

The motion is now made on the ground that the alleged cause of action did not arise within the jurisdiction of the Court, and is supported only by the examination of the plaintiff taken by the defendants.

This was done at some length. It appears therein that the real claim is one for  $7\frac{1}{2}$  per cent. on £800 sterling (which would



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be \$296), for goods sold to agent of the Hees Co. by the defendants in Scotland. The plaintiff claims that as the Hees Co. carries on business in Toronto, he is entitled to commission under the arrangement he had with the defendants.

There are no particulars given in the correspondence as to the mode of payment. The plaintiff says he was never sent money by the defendants, but always drew on them for his commission. This might indicate that the payments were to be made in Scotland, in which case the breach would be there.

The plaintiff, in his affidavit in answer to this, now says that he accepted the defendants' offer, as given in their letters of June and August, 1901, by letter posted here. That letter is not yet forthcoming; but, if it is as plaintiff says, then the contract was made in Ontario, and for the reasons given in *Blackley v. Élite Costume Co.* (1905), 9 O.L.R. 382, this would require the debtor to make payment here, until the contrary was shewn. It would seem, therefore, that the only thing to be done now is to make the same order as was made in the *Blackley* case, and allow the defendants to enter a conditional appearance, with costs in the cause.

No doubt, the Court has a discretion, as Mr. Moss argued, as to allowing service under the Rule. This was decided by a Divisional Court in *Baxter v. Faulkner* (1905), 6 O.W.R. 198 (see judgment of Meredith, C.J., at p. 199). Here, however, the whole, or at least the substantial, point is whether the sale made in Scotland by the defendants to the agent of the Hees Co., under the agreement with the plaintiff and the custom of the business, entitled the plaintiff to his usual commission. The evidence on this point must be found here, if the contract was made here. There is no affidavit from the defendants here, as there was in the *Baxter* case, so that so far they do not deny the plaintiff's story. This would therefore seem not to be a case in which the discretion of the Court should send the plaintiff to seek relief in Scotland. The defendants should plead in a fortnight.

The defendants' appeal from the above judgment was argued on March 12th, 1909, before MEREDITH, C.J.C.P., in Chambers.

C. A. Moss, for the appellants.

W. E. Middleton, K.C., for the plaintiff.

April 14. MEREDITH, C.J.:—This is an appeal by the defendants from an order of the Master in Chambers, dated March 6th, 1909, refusing to set aside the service of the writ of summons and statement of claim, and his order of December 12th, 1908, allowing service of the writ to be made out of Ontario, but giving the appellants leave to enter a conditional appearance.

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The appellants are manufacturers residing and carrying on business in Scotland, and the respondent is a manufacturers' agent, residing and carrying on business in Ontario, and the action is brought to recover commissions on sales of goods manufactured and sold by the appellants, in respect of which the respondent claims to be entitled to commission.

The respondent has been employed as the agent of the appellants in Canada for several years. His employment was arranged for by correspondence, and the contract between the parties was completed by a letter from the respondent to the appellants written and posted at Toronto, accepting an offer made by the appellants to him in a previous letter from them. The contract was, therefore, made in Ontario, and the part of it which was to be performed by the respondent was to be performed within Ontario.

Nothing, however, is said in the correspondence as to how or in what manner payment of commissions was to be made, but the course of business has invariably been for the respondent to draw on the appellants at sight for his commissions, and for the appellants to accept and pay the drafts in Scotland.

Unless the adoption of this practice takes the case out of the principle upon which *Hoerler v. Hanover, etc., Works* (1893), 10 Times L.R. 22, 103, and *Blackley v. Elite Costume Co.*, 9 O.L.R. 382, were decided, these cases are conclusive against the appellants, and the order of the Master in Chambers was rightly made.

According to the legal construction of the contract, the place of payment was, I think, where the respondent carried on his business, and parol evidence is not admissible to shew that the contrary was the intention of the parties: *Greaves v. Ashlin* (1813), 3 Camp. 426; *Ford v. Yates* (1841), 2 M. & G. 549. It follows, I think, that the contract is to be treated as if it contained this provision as an expressed term of it, and, therefore, evidence of the course of business after the contract was made is not admissible to shew that the parties meant that payment should be made in Scotland: Beal on Legal Interpretation, 2nd ed., p. 126.

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The rule which admits proof of existing facts *dehors* a written document in order to construe it, is limited to facts relating to it which were existing at the time the written contract was made and which were known to both parties: Beal on Legal Interpretation, 2nd ed., pp. 123-4.

For these reasons I am of opinion that the order was rightly made and must be affirmed, and the costs of the appeal will be costs in the cause to the respondent in any event of the action.

A. H. F. L.

[MEREDITH, C.J.C.P.]

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IN RE CLARKE AND TORONTO GREY AND BRUCE R.W. Co.

Mar. 23.

*Railway—Compensation Awarded for Lands Taken—Interest—Jurisdiction of Arbitrators—Possession Taken by Company under Warrants of Possession—Payment of Money into Court—Payment out—Rate of Interest.*

The power conferred on arbitrators appointed under the Railway Act, R.S.C. 1906, ch. 37, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely, the date of the filing of the plan, etc.

*Re Canadian Northern R.W. Co. and Robinson* (1908), 17 Man. L.R. 396, approved of; *Re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, dissented from.

Cases decided under the arbitration sections of the Municipal Act distinguished.

Prior to the making of the awards, possession of the lands was taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded:—

*Held*, that the owners were entitled to have paid to them, out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent., payable from the date of the warrants of possession until the date of the payment out.

*Re Lea and Ontario and Quebec R.W. Co.* (1885), 21 C.L.J. 154, *Re Taylor and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 371, and *Re Philbrick and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 373, referred to and discussed.

THESE were appeals by the railway company from the awards, dated 23rd December, 1908, made by John Smith and Duncan McGibbon, Esquires, two of the arbitrators appointed under the provisions of the Railway Act, R.S.C. 1906, ch. 37, to determine the compensation to be paid to the respondents respectively for the

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land taken by the appellants for the purposes of their railway, by which the compensation, in the case of the respondent Robert Clarke, was fixed at \$1,570, and in the case of the other respondents, Margaret and Charles Clarke, at \$1,500, and in each case interest on the sum awarded, at the rate of 5 per cent. per annum from the 14th March, 1907, that being the date of the deposit by the railway company of the plan, profile, and book of reference, was awarded to the respondents.

The respondents also moved for payment to them, out of the sums paid into Court by the appellants on obtaining warrants of possession, of the compensation so awarded, with interest from the 14th March, 1907.

The appeals and motion were heard before MEREDITH, C.J.C.P., sitting in the Weekly Court, on March 3rd, 1909.

*I. F. Hellmuth*, K.C., and *Angus MacMurchy*, K.C., for the appellants.

*B. F. Justin*, K.C., for the respondents.

March 23. MEREDITH, C.J.C.P.:—At the close of the argument I determined that the appellants had not made a case for reducing the sums awarded as compensation on the ground that they were excessive, and reserved judgment on the two other questions argued: (1) that the arbitrators had no authority to award interest; and (2) that the respondents were not entitled to anything beyond the compensation awarded, except such interest as, according to the practice of the Court, is payable on the amounts awarded as compensation while they have been in Court.

By sub-sec. 2 of sec. 192 of the Act it is provided that the date of the deposit of the plan, profile, and book of reference which a railway company is by sec. 158 required to make, is to be the date with reference to which the compensation or damages which the company is by sec. 155 required to pay are to be ascertained.

The first step to be taken by the company, in case it is unable to agree with a land owner as to the compensation or damages which he is entitled to receive, is to serve upon him a notice describing the lands to be taken or the powers intended to be exercised with regard to any lands described in the notice, and a declaration of readiness to pay "a certain sum or rent" as compensation for the lands or for the damages: sec. 193.



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Section 215 deals with the right of the company to take possession, and is as follows:—

“215. Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon payment into Court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right or to do the thing for which such compensation or annual rent has been awarded or agreed upon.”

By sec. 217 provision is made for the granting, before an award or agreement has been made, a warrant for possession, on the Judge being satisfied by affidavit that the immediate possession of the lands or of the power to do the thing mentioned in the notice is necessary to carry on some part of the railway with which the company is ready forthwith to proceed; but the warrant is not to be granted until after a prescribed notice or unless the company gives security to the satisfaction of the Judge by payment into Court of a sum, in his estimation, sufficient to cover the probable compensation and costs of the arbitration, and “not less than fifty per centum above the amount mentioned in the notice served upon the party stating the compensation offered:” sec. 218.

The plan, profile, and book of reference, as I have mentioned, were deposited on the 14th March, 1907.

The notice provided for by sec. 193 was served on the 16th July, 1907, and on the 1st August, 1907, warrants for possession were obtained in both cases, \$2,300 in the first case and \$1,800 in the second case having been paid into Court by the company, pursuant to sec. 218.

I am of opinion that the arbitrators had no authority to award interest upon the amounts of the compensation awarded; their authority was only to determine the amount of the compensation, and that they were required to fix as of the date of the deposit of the plan, profile, and book of reference: sec. 192.

It may be and has been said that it is most unjust to a land owner that he should be restricted in his claim to compensation to the value of the land at the date of the deposit of the plan, profile, and book of reference; that when these have been deposited,

the power of the land owner to deal with his land is curtailed, and in the case of a farmer the cropping and cultivation of his land is interfered with, and that, if interest be not allowed, he receives no compensation for the injury caused by so tying up his land; but these are considerations to be urged upon Parliament as reasons for a change in the law, and do not justify a Court in straining the language of the statute so as to obviate inflicting injustice.

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The question has recently been considered by the Court of Appeal for Manitoba, in *In re Canadian Northern R.W. Co. and Robinson* (1908), 17 Man. L.R. 396, and, after full consideration and discussion of the various provisions of the Railway Act, the conclusion was reached that "interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award."

I entirely agree with the conclusion reached by the Manitoba Court and with the reasons given by Mr. Justice Phippen for that conclusion, and differ, therefore, as that Court did, from the view taken by my brother Riddell in *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523.

Mr. Justin contended that, according to the decisions of the Courts of this Province, the arbitrators had power to award the interest in addition to the compensation, but with that contention I am unable to agree.

*In re Cavanagh and Canada Atlantic R.W. Co.*, no doubt, supports his contention; but it may be pointed out that in that case the railway company had, under the provisions of what is now sec. 178, obtained from the Board of Railway Commissioners authority to take the lands in respect of which the compensation had been awarded, and, by so doing, as my brother Riddell said (p. 530), made it "practically impossible for the owner to do anything with his land except hold it for the company;" but I am not at all sure that my learned brother would not have reached the same conclusion if that circumstance had not existed.

My learned brother followed *James v. Ontario and Quebec R.W. Co.* (1886), 12 O.R. 624, which, he said, decided that "interest is properly allowed to the land owner on the amount of his compensation from the time of taking," which he interpreted

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as meaning from the time the land owner knew that he had to give up the land "to the time of the award."

In the *James* case the arbitrators had allowed interest from the time of the service on the land owner of the notice provided for by what is now sec. 193, and all that was decided was that the award was not in that respect open to objection.

There was an appeal in that case to the Court of Appeal (1888), 15 A.R. 1, and one of the objections to the award taken there was that the arbitrators had charged the railway company with interest from the date of the notice to arbitrate, whereas it should only have been charged from the date on which the company took possession of the land. Dealing with this ground of appeal, Osler, J.A., said (p. 10): "The point was somewhat laboured on the argument, but as the difference appears to be, as one of the learned counsel for the company expressed it, 'so small as to be scarcely worth troubling about,' we may adopt that view, and decline to decide it."

The question, therefore, as far as the Court of Appeal is concerned, is left open for future decision.

In *In re Birely and Toronto Hamilton and Buffalo R.W. Co.* (1897), 28 O.R. 468, the arbitrators had allowed interest on the amount awarded from the time the work was completed and the powers were exercised: p. 469; and, in dismissing an appeal against this allowance, Armour, C.J., held that the arbitrators might, in awarding compensation, make an allowance in the nature of interest from the time when the right to compensation accrued: p. 470.

The cases of arbitration under the Municipal Act are distinguishable.

In *In re McPherson and City of Toronto* (1895), 26 O.R. 558, Street, J., pointed out that the effect of the by-law by reason of which the compensation became payable was to vest the land immediately in the corporation as a public road, and he thought that the land must, therefore, from the date of the passing of the by-law be deemed to have been taken by the corporation, and, therefore, that, as declared by authorities binding on him—mentioning *Rhys v. Dare Valley R.W. Co.* (1874), L.R. 19 Eq. 93; *In re Shaw and Corporation of Birmingham* (1884), 27 Ch. D. 614, 619; *James v. Ontario and Quebec R.W. Co.*, *supra*—the land owner was entitled to interest from the date of the by-law.

The reference by Osler, J.A., in *In re Leak and City of Toronto* (1899), 26 A.R. 351, 357, is to arbitrations under the Municipal Act, and the observations I have made as to the *McPherson* case apply to what was said by him.

As my decision is not subject to appeal to any Ontario or Canadian Court—if, indeed, it be not absolutely final and without appeal to any tribunal, which must remain an open question until the Judicial Committee of the Privy Council has dealt with an appeal taken to it from an adjudication upon an appeal under sec. 209—I am not bound to follow the decision of my brother Riddell, but I am at liberty to follow that of the Manitoba Court, though not binding on me, in preference to it. I take this course the more readily because the question is one arising on a Dominion statute, and it is important that the same construction should be given to it in all the Provinces, and because the Manitoba decision accords with my own view of what the law is.

The result, therefore, of the motions by way of appeal from the awards is that each award must be varied by striking out that part of it which deals with the interest, and that in other respects both motions must be dismissed.

The appellants must pay to the respondents the costs of both appeals, except so much of them as relates to the question of interest, and as to this there will be no costs to either party. I give no costs of this branch of the appeal, because I think that, in view of the *Cavanagh and Canada Atlantic R.W. Co.* case, the arbitrators were justified in awarding interest and the respondents in claiming it.

There remains to be considered the question raised on the motions of the land owners for payment out.

In support of the railway company's contention that the land owners are entitled only to such interest as, according to the practice of the Court, is payable on the amounts awarded as compensation while they have been in Court, counsel referred to *In re Lea and Ontario and Quebec R.W. Co.* (1885), 21 C.L.J. 154; *In re Taylor and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 371; and *In re Philbrick and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 373.

In the *Lea* case the question arose, as in this case, with respect to money paid into Court by the railway company on obtaining

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a warrant for possession. In the short report of the case it is said that Galt, J., "following *Great Western R.W. Co. v. Jones* and *Wilkins v. Geddes* (1879), 3 S.C.R. 216, made an order for payment to both parties of their respective shares out of the \$8,000, with interest thereon at the rate of 4 per cent. from date of the taking of possession of the land by the company."

In *Wilkins v. Geddes* no such question arose as is presented for decision in this case. In that case the Minister of Public Works for Canada, under the authority of the Public Works Act, paid to the prothonotary of the Supreme Court of Nova Scotia at Halifax \$6,180, the amount awarded to a land owner as compensation for land appropriated to the use of the Dominion, with six months' interest added; and the question was as to the liability of the prothonotary to pay interest on the sum so paid to him, his contention being that he was not under any such liability; and all that was decided was that he was not entitled to the interest which the money deposited earned while under the control of the Court, and that an order requiring him to pay to the land owner interest on the amount deposited at the rate of four per cent. per annum, there being no evidence as to what had been actually earned, was rightly made, and that the Court had jurisdiction to make it.

*Great Western R.W. Co. v. Jones*, the other case referred to by Galt, J., is reported (1867) 13 Gr. 355; but is, I think, quite distinguishable. In that case the question arose owing to a claim by the defendant Jones to land which the principal officers of Her Majesty's Ordnance had agreed to sell to the railway company for £700. Before the purchase money was paid or a conveyance was executed, the railway company took possession. Jones then brought an action of ejectment against the railway company, and the company instituted a suit in Chancery to restrain the action and for other relief. Jones claimed as mortgagee of Sir Allan McNab, and he and Lady McNab and the Principal Secretary of State for the War Department and the Attorney-General for Upper Canada were made defendants to this suit. The Vice-Chancellor held that the plaintiffs were entitled to a conveyance of the land on payment of the £700 sterling, with interest, and that Jones was not entitled to any part of that sum, but was unable to decide whether the Provincial Government

or the Ordnance Department was entitled to the money, and the Vice-Chancellor therefore ordered that the money be paid into Court, with liberty to the Attorney-General and the Secretary of War to apply as they might be advised. On settling the minutes of the decree, a question arose as to the railway company's liability to pay interest. It was contended by the railway company that it had had at its credit with its bankers ever since the 2nd August, 1860, more than the amount of the purchase money, and that it had on that day given notice to the War Department of an appropriation of money to meet the sum the railway company was to pay, and all that was decided was that, in the circumstances of that case, there was no such appropriation as relieved the railway company of liability to pay interest on the purchase price after it had taken possession.

In Fry on Specific Performance, 4th ed., par. 1445, it is said: "It follows from the principles already stated and discussed in this chapter that, generally, in the absence of stipulation, a purchaser in possession of the estate which is the subject matter of the contract must pay interest on the unpaid purchase money from the time when his possession under the contract commenced until completion." And in par. 1450 it is stated: "But where a purchaser had been let into possession at the intended time for completion, and afterwards, difficulties having without any fault on his part arisen to delay completion, paid the purchase money into a separate account at a bank, and gave notice to the vendors that the money was appropriated to the purposes of the contract, and that he was ready to complete, Lord Romilly, M.R., held that he was not chargeable with interest after the date of his notice, but must pay to the vendors any interest he had received from the bank in respect of the sum paid in."

The case in which this was decided is *Kershaw v. Kershaw* (1869), L.R. 9 Eq. 56; and it was upon the principle of it that the railway company, in *Great Western R.W. Co. v. Jones*, relied to relieve it from liability to pay interest after what was claimed to have been an appropriation had been made, and notice of it had been given to the War Department.

This principle has, in my opinion, no application to the cases with which I have to deal. Here the payment into Court was a matter entirely for the benefit of the railway company. It

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desired, in advance of the time when, in the ordinary course, it would have been entitled to possession, to be let into possession, and the money paid into Court as the condition of obtaining the warrants of possession was paid in only as security to the land owners for the compensation money to which they were entitled, and the amount of which, through no fault of theirs, had not yet been ascertained, and it would be most unjust to them that moneys so paid in, for which but a very low rate of interest is allowed by the Court, and which they had no means or opportunity of requiring to be invested, should be treated as if it had been paid to them, and that they should be entitled only to the interest payable according to the practice of the Court, when they had been deprived of possession of their land for the benefit of the railway company, and the delay in completing the purchase was in no way due to fault on their part.

The principle upon which appropriation of the purchase money has been held to prevent interest from running is stated by an eminent text-writer to be extremely unsatisfactory, and the writer adds: "Whether there is, or is not, an express stipulation for the payment of interest, it is equally difficult to see why any dealing with the purchase money short of payment to the vendor under the contract should prevent interest being payable. It must surely be in the power of the vendor to stand upon his legal rights and say '*non hæc in foedera veni*,' unless, in attempting to avail himself of those legal rights, he is in substance seeking to take advantage of his own wrong. The authorities, however, appear to establish that appropriation may in certain cases prevent interest from running, though it is believed that these authorities have not been followed in unreported cases by eminent Judges." Dart on Vendors and Purchasers, 7th ed., pp. 658.

Agreeing, as I do, with the view thus expressed, I am not disposed to extend the application of the rule or supposed rule beyond what is covered by decided cases which it is my duty to follow.

In *In re Taylor and Ontario and Quebec R.W. Co.*, 11 P.R. 371, by consent of the land owner and the railway company \$9,000 had been paid into Court on the company obtaining a warrant for possession, and before the amount of the compensation had been determined, and O'Connor, J., held, on the authority of *Great Western R.W. Co. v. Jones*, *In re Lea*, and *Wilkins v. Geddes*, that

the land owner was entitled only to the rate of interest earned by the fund in Court. In *In re Philbrick* the question was as to the rate of interest to be allowed after the award, and the learned Chancellor, while he said that it was his duty to follow *In re Lea*, and that he thought he would have reached the same conclusion independently of it, pointed out that when the award was made, as it was not complained of by either party, it was competent for the proprietor to have applied for and obtained the amount then awarded to him.

It may be pointed out that in the cases in which the railway company is authorized to pay the compensation into Court, it is required to pay in, in addition to the compensation, six months' interest on it: sec. 210; and that provision is made that where an order for distribution, payment, or investment is made within six months after the payment into Court, a proportionate part of the interest is to be returned to the company.

It seems not very consistent with this requirement that the land owner, where the railway company, for its own purposes, compels him to give up possession, should not be entitled to interest on the compensation from the time of taking possession, but is to be left to look to the interest which is earned by so much of the fund as equals the amount of the compensation according to the practice of the Court, which may be nothing, and certainly will be much less than legal interest on the amount of the compensation, although the money in Court is in no sense his, but stands only as security for the payment of the compensation, which, as I have said, he has no power to withdraw, and the investment of which so as to earn interest he has no right to require.

In my opinion, the land owners are entitled to be paid out of the moneys in Court the amounts of compensation awarded to them respectively, with interest at five per cent. per annum from the date of the warrants of possession, and there will be an order accordingly, and the railway company must pay the costs of the motions for payment out.

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[RIDDELL, J.]

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RE EAGAN AND DAWSON;

March 22.

*Vendor and Purchaser—Bond by Owner of Land—Charge on Land.*

J.E., the owner of certain land, executed a bond (which was registered) whereby, for himself, his heirs, executors, or administrators, he covenanted that, on his effecting a sale of the land, which, however, was to be entirely at his option, he would pay to A.E. half the purchase money. He died without having effected a sale; and subsequently A.E. died. J.E. by his will devised the land to I. E. for life, with remainder in fee to L.D.E., and they both joined in an agreement to sell to D.:—

*Held*, without deciding whether the bond was in force as between J.E. and A.E.'s representatives, that it did not constitute a charge on the land, the liability thereunder being merely of a personal character.

*Baker v. Trusts and Guarantee Co.* (1898), 29 O.R. 456, distinguished.

THIS was an application made under the Vendors and Purchasers Act for the opinion of the Court as to the interest, if any, of the representatives of Anne Eagan in certain property owned by John Eagan in his lifetime, under a bond given by him, as to which land, after his death, an agreement had been entered into for the sale thereof to Ernest J. Dawson. The facts are stated in the judgment.

On March 20th, 1909, the application was heard before RIDDELL, J., sitting in the Weekly Court at London.

*J. M. McEvoy*, for the vendors.

*F. E. Perrin*, for the purchaser.

March 22. RIDDELL, J.:—In 1870 John Eagan executed a bond in the sum of \$1,000 to be paid to Anne Eagan. The condition was: "If the above bounden John Eagan, his heirs, executors, or administrators, do well and truly pay or cause to be paid unto the said Anne Eagan one-half of the price or purchase money which he, the said above bounden John Eagan, his heirs, executors, or administrators, shall receive or be paid for," Blackacre, "now owned by him, the said above bounden John Eagan, when and at such time or times as the said price or purchase money shall be paid to the above bounden John Eagan, his heirs, executors, or administrators (the amount of such price or purchase money and the time when such sale shall be made being entirely at the option of the said above bounden John Eagan), then this obligation to be void . . ."

This bond was registered. John Eagan died without having made a sale of the land, but leaving a will made in 1906 devising the land to his wife Isabella Eagan for life, with remainder in fee to his niece Laura Dorothy Eagan.

These ladies have made a sale to Ernest J. Dawson, who raises the difficulty that the representatives of Anne Eagan have an interest in the land. Anne Eagan is dead, but has left next of kin and heirs-at-law.

The vendors (as appears from their solicitor's letter) contend that the bond is personal only, and that, owing to the death of Anne Eagan, it is no longer in force. She died after John Eagan.

An application under the Vendors and Purchasers Act was made before me at the London Weekly Court, March 20th, 1909.

The present is not such a case as *Baker v. Trusts and Guarantee Co.* (1898), 29 O.R. 456, in which, in the bond itself, a contract was set out giving the plaintiffs a charge or lien on the land. While it is true that in the present case the land is mentioned in the condition, and the whole document has been admitted to registry, I think it clear that no title or interest in the land is given by the bond to Anne Eagan, and no charge or lien can be found in her favour.

It is not necessary to consider whether the bond is still in force between the representatives of Anne Eagan and those of John Eagan. The whole liability, if any, is a personal liability. It appears from the condition of the bond that the "price or purchase money" was intended to "be paid to . . . John Eagan, his heirs, executors, or administrators;" and the purchaser is quite safe in so paying it. Whether any part of this sum must then be paid to the representatives of Anne Eagan is a question with which the purchaser has nothing to do. Admittedly the title is in the devisees of John Eagan, and they can consequently make title.

An order will be made so declaring, and the purchaser will pay the costs of this application.

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## [IN THE COURT OF APPEAL.]

C. A.

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Dec. 31.

REX v. WHITE.

*Criminal Law—Evidence—Untrue Statement Made to Prisoner—Subsequent Voluntary Statement by Prisoner—Admissibility—Confession Obtained by Artifice.*

The prisoner W. was tried for attempting to murder J. P., whose wife, M. P., was tried at the same time for aiding and abetting in the attempt. Before the trial, and while W. was in custody, a police officer made an untrue statement to him, that M. P. had "done some talking" about the matter, upon which W. voluntarily made statements to the officer as to the key of J. P.'s house, and as to a club which he said he had used:—

*Held*, that evidence was properly admitted as to the statements made by W. with regard to the key and the club.

Subsequently to the making of the untrue statement by the police officer, conversations were overheard between W. and his father and between W. and M. P., in which the former admitted his guilt:—

*Held*, that evidence was properly admitted as to these conversations.

*Per OSLER, J.A.*—Though the practice is not to be approved of, it is, generally speaking, no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

CASE reserved by BOYD, C., as to the admissibility of certain evidence upon the trial of the prisoner for attempting to murder or to do bodily harm to one Joshua Pearce.

The facts and questions submitted are stated in the judgment of OSLER, J.A.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 3rd December, 1908.

*J. R. Cartwright*, K.C., for the Crown, referred to Joy on Confessions (1842), p. 42, as shewing that a confession is admissible, although obtained by artifice, and to the case of *Rex v. Burley* (1818), there cited; also to Russell on Crimes, 6th ed., vol. 3, p. 485; Roscoe, 13th ed., p. 44; Archbold's Criminal Pleading and Evidence, 23rd ed., p. 334.

The prisoner was not represented.

December 31. OSLER, J.A.:—The prisoner and one Martha Pearce were jointly indicted and tried at Sandwich before the Chancellor, the prisoner for attempting to murder or to do bodily harm to one Joshua Pearce, and Martha Pearce, Pearce's wife, for aiding and abetting White in the attempt.

As to the wife the case was withdrawn from the jury. White was found guilty, and sentenced to ten years' imprisonment, subject

to the opinion of the Court of Appeal upon a case reserved by the trial Judge as to the admissibility of certain evidence. The evidence was returned with and made part of the case, in which the substance of it was also briefly stated, with the questions desired to be answered, as follows:—

The prisoners were arraigned on the 28th April, and on the morning of that day, while in custody, the prisoner White had some talk with officer Jackson, during which the officer told the prisoner that the woman, Pearce's wife, had made a statement in connection with the matter. He did not say that she had implicated him (White), but only that she had done some talking, and White said if she had he was going to tell his side of the story. Jackson said if he wanted to make a statement he would send him to the Chief of Police or send for the Chief.

Jackson admitted at the trial that it was untrue that Mrs. Pearce had made statements.

White went before the Chief and made a statement, which was rejected by the trial Judge.

On going out from the Chief, White said to officer Jackson, in the lockup, that he had not told the Chief exactly where the key of Pearce's house was, and said, "it is in the Grand Trunk freight office in my locker, down amongst some oil cans." A key was afterwards found there and produced at the trial. The key was taken by officer Reid to the house, in company with White as a prisoner, and the door was opened by it, and then and there White volunteered a statement that he got the key from Mrs. Pearce, the wife. The prisoner also said that he had used a club which he had thrown into the bush, and he was taken to search for it by officer Reid, but after some search the club was not found.

After this untrue information given by Jackson to the prisoner, and apparently later on the same day, there was an interview between the prisoner White and his father, and the Chief of Police in the corridor outside overheard the prisoner admitting to his father that he had beaten and assaulted Joshua Pearce.

Also, after the untrue information given by Jackson, officer Reid, being in the office, overheard a conversation between the two prisoners, speaking out of their separate adjoining cells, in which she reproached him for telling when she had not told, and in which by implication he admitted his guilt.

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Also, Reid overheard a conversation between the prisoner and his father in which the father told him he was foolish for taking the blame on himself. This may have been part of the talk with the father overheard by the Chief of Police, or it may have been at another hour, but in either way subsequent to the untrue statement made by Jackson to White.

The questions for the opinion of the Court are:—

1. Whether evidence was properly admitted as to the key.
2. As to the club.
3. As to what was spoken between the father and the son as heard by the Chief and the officer Reid.
4. As to what was spoken between the two prisoners when in the cells.

Whether the statement made by the prisoner White to the chief of police, Wills, was rejected because it was assumed to have been made in consequence of the untrue statement made to the prisoner by the police officer Jackson that his fellow prisoner, the woman Pearce, had “done some talking” in connection with the matter, or for that reason as well as because the chief of police had not cautioned the prisoner before questioning him or allowing him to make his statement, does not very clearly appear, nor is it material to the consideration of the questions submitted.

All the confessions or admissions of the prisoner, the evidence of which is now objected to, were made at different times, some on the day, some the day after, the conversation with the police officer Jackson, and the contention is that they should all have been regarded as influenced by the false statement of that officer, and should, for that reason, have been rejected as not having been freely and voluntarily made, the inference suggested being that the prisoner, having been led to assume that the wife had implicated him in some way, would naturally retaliate upon her or attempt to minimize his own share in the transaction, and would thus be induced to talk about it, when he would otherwise have been silent.

Jackson, it may be observed, did not question the prisoner; his false statement was made in answer to a direct inquiry by the latter, and there is no evidence that any of the conversations, the evidence of which was admitted, took place in consequence of any

inducement or promise or threat held out or made by Jackson or any one else.

I am of opinion that the evidence in question was properly admitted, even though it be assumed that the prisoner's confessions or admissions may have been in some degree influenced by the officer's misstatement. The weight to be attached to them was a matter for the consideration of the jury under all the circumstances. They were rightly held to have been freely and voluntarily made, uninfluenced by inducement or threat of any kind.

Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made.

"A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt or is obtained by artifice or deception:" Joy on Confessions (1842), p. 42; Archbold's Criminal Pleading and Evidence, 22nd ed. (1900), p. 306; Roscoe, 13th ed., p. 44.

"If no inducement has been held out relating to the charge, it matters not in what way the confession has been obtained, for, whether it was induced by a solemn promise of secrecy, even confirmed by an oath, or by reason of the prisoner having been drunken, or even by deception practised upon him or false representations made to him for such purpose, it will be equally admissible . . . What the accused has been overheard muttering to himself or saying to his wife or to any other person in confidence is also receivable in evidence:" Taylor on Evidence, 9th ed. (1897), sec. 881; and see *The King v. Ryan* (1905), 9 Can. Crim. Cas. 347 (Ont.); Phillips on Evidence, p. 427; Phipson on the Law of Evidence (1902), p. 230.

The authorities are cited in the text-books referred to. The latter writer adds: "Recent decisions, however, shew an increasing tendency to exclude evidence obtained by the police by unfair or irregular means;" and I have no doubt that in some circumstances it may appear that a confession so obtained ought to be regarded as not having been freely and voluntarily made, and as open, on principle, to the objection on which the rejection of evidence of that class is founded. The case of *Regina v. Histed* (1898), 19 Cox C.C. 16, is an illustration of what I refer to. Nothing in the present case, however, invites its application.

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The statement made to the officer Jackson, after the interview with the Chief of Police, as to where the key of Pearce's house would be found, confirmed as it was by the finding of the key in the place described, was plainly admissible, for, even if accompanying language amounting to a confession was inadmissible as possibly untrue, this fact at least was not: Archbold's Criminal Pleading and Evidence, 22nd ed., p. 308; Phipson, p. 232.

The other statements made in conversation with the prisoner's father and the prosecutor's wife and officer Reid, were admissible, for the reasons already given. Each of the questions, therefore, should be answered in the affirmative, and the conviction affirmed.

I will add, speaking for myself, that the practice of police officers of any grade examining prisoners is to be disapproved of, and that the obtaining confessions or statements from them by trick or deception is to be strongly reprobated; the latter in particular tends only to obstruct the course of justice by discrediting an officer whose testimony might otherwise be useful.

MEREDITH, J.A.:—There was, in my opinion, no good, or even plausible, ground for the objection to the admissibility of the evidence in question.

There was nothing in the nature of a threat or promise contained in, or arising out of, the deception practised upon the prisoner by the peace officer Jackson. There is nothing to be found in any of the cases, or in any of the books, giving encouragement to the contention that a confession obtained by an artifice or deception, without any sort of threat or inducement, is inadmissible; on the contrary, they invariably shew that it is admissible: see *Rex v. Derrington* (1826), 2 C. & P. 418; *State v. Rush* (1888), 95 Mo. 199; and *King v. State* (1867), 40 Ala. 314.

In regard to the conversations merely overheard, they were also plainly admissible.

I would answer all the questions in the affirmative.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

G. G.

## [IN THE COURT OF APPEAL.]

## RE S. H. KNOX &amp; CO. ASSESSMENT.

C. A.

1909

April 5.

*Assessment and Taxes—Assessment Act, sec. 10 (1) (e)—Departmental Store—Question of Fact—Decision of Ontario Railway and Municipal Board—Appeal—6 Edw. VII. ch. 31, sec. 51 (3).*

By sub-sec. 3 of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, an appeal from the decision of the Board on an appeal thereto from a court of revision, lies only upon a question of law.

Whether or not a firm carried on the business of what was known as a departmental store or that of a retail merchant dealing in more than five branches of retail trade or business in the same premises or separate departments of premises under one roof or in connected premises, so as to be liable to the assessment imposed by sec. 10 (1) (e) of the Assessment Act, 4 Edw. VII. ch. 23 (O.), is a question of fact and not of law; MEREDITH, J.A., dissenting.

Leave, therefore, to appeal in such a case from the decision of the Board was refused.

*Per MEREDITH, J.A.:*—The real question was the interpretation of the section in question upon the facts submitted, and this must be deemed to be a question of law.

THIS was an application by the corporation of the city of Toronto, under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, for leave to appeal from an order of the Board, made on an appeal by S. H. Knox & Co. from a decision of the court of revision for the city of Toronto, cancelling the assessment made in respect of the premises No. 164 Yonge street, in the said city, and reversing the decision of the court of revision whereby the company were held liable to assessment under sec. 10 (1) (e) of the Assessment Act, 4 Edw. VII. ch. 23 (O.)

The grounds upon which the application was based were that the Board erred in the construction and application of the said Assessment Act, and in particular sec. 10, clause (e), thereof, and that, when the said sub-section was properly construed and applied, the said S. H. Knox & Co. were, upon the admitted facts, liable to assessment under the said clause as a "person carrying on the business of what is known as a departmental store or of a retail merchant dealing in more than five branches of retail trade or business in the same premises or in separate departments of premises under one roof," and should be assessed for fifty per cent. of the assessed value of the said premises, and not for twenty-five per cent. thereof, under clause (g) of sub-sec. 10, as directed by the judgment, decision, or order of the Board.



C. A.            A former judgment of the Court of Appeal, upon a stated  
1909            case, is reported 17 O.L.R. 175.

Re  
S. H. KNOX            On February 11th, 1909, the application was heard before  
& Co.  
ASSESSMENT.        MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.  
                      *J. S. Fullerton*, K.C., for the applicants.  
                      *D. W. Saunders*, K.C., for S. H. Knox & Co.

The arguments sufficiently appear from the judgments.

April 5. Moss, C.J.O.:—The city of Toronto apply, under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, for leave to appeal from a decision of the Board, pronounced upon an appeal by S. H. Knox & Co. from the court of revision of the city of Toronto, which held them liable to assessment under sec. 10 (1) (e) of the Assessment Act.

In their reasons for their decision, the Board, after setting out their findings upon the evidence, state as follows: "The Board are of opinion that the applicants do not carry on the business of what is known as a departmental store, or of a retail merchant dealing in more than five branches of retail trade or business in the same premises or in separate departments of premises under one roof or in connected premises; and this Board so finds as a fact upon the evidence."

An examination of the evidence satisfies me that the facts proved support these findings. I am unable to see how any question of law can arise. We do not know *à priori* what the business of a departmental store or of a retail merchant in any particular branch of a retail trade is. We can only derive our knowledge of what either is from the testimony of persons acquainted with the business either as traders or customers. Then comes the question whether S. H. Knox & Co. are or are not carrying on business of the kind specified. That must depend on the facts proved, and the conclusion upon them can be no other than one of fact. Upon what premises could a Court say, as a matter of law, that what is being done is the carrying on of the business of a departmental store or of a retail merchant of the character mentioned in the Act? The evidence here shews that such dealings as S. H. Knox & Co. are engaged in, and the possession of the lines of goods they are offering for sale and disposing of, would

not, according to the experience and understanding of those familiar with what constitutes the business of a departmental store or of a retail merchant, bring them within either category.

How can the Court undertake to say as a conclusion of law that the contrary is the case?

The appeal to this Court being limited to questions of law, I think that there is no jurisdiction to grant leave in this case.

The motion is refused with costs.

Whether Knox & Co. were carrying on the business of a departmental store or of a retail merchant dealing in more than five (5) branches of retail business in the same premises or in separate departments of premises under one roof, and, therefore, assessable under sec. 10 (1) (e) of the Assessment Act, was a question of fact and nothing else. As such this Court has no jurisdiction to entertain an appeal from the decision of the Board, and the application for leave to appeal must therefore be refused.

GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A.:—If an appeal lie in such a case as this, leave to appeal ought to be granted. The amount of money involved is considerable; it is an annually recurring question; it is one that affects the respondents in other municipalities in which they carry on the same kind of business, and it affects others in the like business, as well as others who may in the future engage in it, the number of which may be increased if the ruling in question stands.

Whether an appeal does or does not lie depends wholly upon this, whether the question involved is one of law, within the meaning of the legislation giving the Ontario Railway and Municipal Board power to deal with it. An appeal from them to this Court lies only upon "all questions of law." What is meant by a question of law is that which is so called when the different functions of Judge and jury are in question; that is, no appeal lies when the question would have been one for the jury, in the case of a trial by jury; but that, in cases in which it would have been a question for the Court and not for the jury, an appeal lies. It could not have been meant to limit the right of appeal to cases in which, in the strictest literal sense, no question of fact is involved; for, if that were so, it would be somewhat difficult

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to state many cases in which an appeal would lie. The question of reasonable and probable cause, in an action for malicious prosecution, is a question of fact, but it is a question for the Court, and not for the jury, and so, in that sense, is called a question of law; so, also, as to the question whether there is any reasonable evidence to go to the jury; and so also as to the interpretation of writings, and many other questions which at once suggest themselves to the mind; indeed, it might be found difficult to suggest any question which might not in some sense be said to involve a question of fact.

The one substantial question involved in this matter is whether the respondents carry on "the business of what is known as a departmental store or a retail merchant dealing in more than five branches of retail trade or business in the same premises or in separate departments of premises under one roof, or in connected premises."

As I understand the evidence, and certainly as it was stated, without question, upon this application, the respondents are dealing in more than five branches of retail business in the same premises; the respondents' witnesses say so in so many words; but it is said that the respondents are not within the meaning of these words, as used in sub-sec. (e) of sec. 10 of the Assessment Act, because their dealings are limited to such goods, in such trades, as they are able to sell, and as they do sell, at the prices of five, ten, and fifteen cents only. That being so, the real question seems to me—if there really be any substantial question—to be one of interpretation of the enactment; and so this case is an appealable one.

I would give leave to appeal.

*Leave refused ; MEREDITH, J.A., dissenting.*

G. F. H.

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[LATCHFORD, J.]

RE ROGER.

1909

June 21.

*Life Insurance—Benefit of Wife—Insurance Act, sec. 160—Declaration in Writing—Identification of Policies.*

R., whose life was insured in a benefit society, by a pre-nuptial contract gave the insurance certificates to his intended wife, and agreed to have them transferred to her after the marriage. Two years afterwards, the marriage having taken place, R. replaced the certificates by policies in an assurance company for a larger sum, and made alterations in a copy of the marriage contract in his possession, so that it read that he gave and granted to his wife "the sum of five thousand dollars, being the amount of an insurance effected on his life with the Canada Life Assurance Company," signing his name on the margin opposite the alterations:—

*Held*, that the writing sufficiently identified the policies to meet the requirements of sec. 160 of the Insurance Act R.S.O. 1897, ch. 203, and operated as a valid declaration under the statute in favour of the wife.

*Re Cheesborough* (1897), 30 O.R. 639, and *Re Harkness* (1904), 8 O.L.R. 720, followed.

APPLICATION by the administrators of the estate of the late William Henry Roger, of Ottawa, made pursuant to Con. Rule 938, for the opinion, advice, or direction of the Court as to the claim by the widow of the deceased to \$5,000 insurance moneys received by the administrators.

The application was heard by LATCHFORD, J., in the Weekly Court at Ottawa, on the 12th June, 1909.

*M. G. Powell*, for the administrators.

*J. F. Orde*, K.C., for the widow.

*J. Travers Lewis*, K.C., for the official guardian.

June 21. LATCHFORD, J.:—On the 16th June, 1902, the claimant, then residing at Quebec, and the late W. H. Roger, of Ottawa, made a marriage contract before a notary at the city of Quebec. The parties to the contract were married on the 18th June, 1902. On the 8th March, 1909, the husband died intestate. Two children survive as the fruit of the union.

At the time the marriage contract was entered into, Mr. Roger had insurance on his life, to the amount of \$3,000, in an insurance association known as the Royal Arcanum. In 1904 the rates in the association were increased, and Mr. Roger resigned and effected other insurance with the Canada Life Assurance Co. for \$5,000. Two policies were issued and delivered to him, each for \$2,500, one dated the 21st June and the other the 8th July.



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On the 10th July, 1904, the deceased, in the presence of his father, altered the paragraph dealing with his life insurance, as that paragraph appeared in a notarial copy of his marriage contract in his possession. He scored out the word "three" from the words "three thousand dollars," which stated the amount of his insurance at the date of the contract, and wrote above it the word "five." He also deleted the words "Royal Arcanum," and wrote above them the words "Canada Life Assurance Company." Mr. Roger wrote in the margin "Ottawa, July 10th, 1904," signed his name opposite the alterations, and asked his father also to sign, and his father did sign, as a witness to the change. The paragraph, as altered, expressed (so far as is material to quote it) that Roger gave and granted to his wife "the sum of five thousand dollars, being the amount of an insurance effected on his life with the Canada Life Assurance Company." He did not alter other words which follow, and more correctly describe the Royal Arcanum than the Canada Life Assurance Company; *sed falsa demonstratio non nocet*. By the paragraph as originally drawn the intended husband agreed to have the insurance certificates which he then held regularly transferred to his wife as soon as possible after marriage. That he made such formal transfers does not appear. It is, however, in evidence that no assignment was indorsed upon the Canada Life policies, nor is there any writing signed by the assured identifying them by number or otherwise (Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 160), nor any document entitling the applicant to the proceeds of the policies, other than the altered clause in the copy of the marriage contract.

In *Re Cheesborough* (1897), 30 O.R. 639, it was held that insurance policies were "otherwise identified" when described as "all my property . . . including life insurance policies and certificates." The words "I give the residue of my property, including life insurance," were held in *Re Harkness* (1904), 8 O.L.R. 720, to constitute a sufficient compliance with the requirements of sec. 160. These decisions are not affected by *In re Cochrane* (1908), 16 O.L.R. 328, as is pointed out in *Re Watters* (1909), 13 O.W.R. 385, by my brother Teetzel.

The words "five thousand dollars, being the amount of an insurance effected on his life with the Canada Life Assurance Company," correctly state the amount of Mr. Roger's insurance. It is

"his" insurance which he deals with, his insurance in the Canada Life Assurance Company. I think he identified the insurance beyond any doubt. The declaration sufficiently creates a trust under the Insurance Act in favour of the wife. It is not like *Kreh v. Moses* (1892), 22 O.R. 307, a transaction in favour of a volunteer. I regard the declaration as creating a trust in favour of Mrs. Roger. The \$5,000 in the hands of the administrators are the moneys of Mrs. Roger, and I advise and direct the administrators to pay her such moneys, less their costs and the costs of the official guardian.

Latchford, J.

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E. B. B.

[DIVISIONAL COURT.]

FREEL v. ROBINSON.

D. C.

1909

May 4.

*Will—Express Revocation by Subsequent Document—Validity of Document as a Will, notwithstanding Invalidity of Bequests—Relationship of Witnesses to Legatees—Mode of Revoking Wills—Evidence of Intent, when Admissible—Dependent Relative Revocation.*

A testatrix, by a holograph will, after directing her executors to pay her debts and funeral charges, gave to them the residue of her estate, in trust to pay certain legacies therein provided for, which included legacies to her sister E. A. R. and her nephew E. B. F. R., and to pay the residue, if any, to the said E. A. R. By a holograph document, written under the will, she revoked her will, and gave to E. A. R. all the money she possessed, save the legacy to E. B. F. R. This was witnessed by the husband of E. A. R. and the wife of E. B. F. R.:—

*Held*, that, while the effect of the relationship of the witnesses to the beneficiaries was to nullify the bequests made to them, the document was, in other respects, valid as a will, and duly revoked the original will, including the appointment of executors.

Judgment of Winchester, Surrogate Court Judge, reversed.

*Re Tuckett* (1907), 9 O.W.R. 979, overruled.

The mode of revoking wills, the admissibility of parol evidence of intent, and the doctrine of dependent relative revocation, discussed.

The Court directed the issue of letters of administration with the will annexed, and the division of the estate as upon an intestacy.

THIS was an appeal by the official guardian, on behalf of Charles Brooks Freel, an infant, from the judgment of Winchester, Surrogate Judge of the county of York.

The testatrix, Ada Freel, by a holograph will, made on the 18th August, 1904, directed, first, that all her just debts and funeral charges should be paid by her executors thereafter named.

"The residue of my estate which shall not be required for the

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payment of my just debts, funeral charges, the execution of this my will, and the administration of my estate, I give and bequeath to my said executors, in trust, with absolute and discretionary power to pay the legacies hereinafter provided, as they may deem most advantageous to the legatees herein named." She then gave the following legacies: to her sister Elizabeth Arvilla Robinson, \$1,000; to her brother Byron E. Freel \$700; to her nephew E. B. F. Robinson, \$100. The residue of her estate, if any, she gave to her sister Elizabeth Arvilla Robinson. She then directed that should there be any of the legacy to Mrs. Robinson remaining unpaid at her death, her executors were to pay the same to her niece Ada B. Robinson and to E. B. F. Robinson, share and share alike; and in like manner as to her brother Byron's legacy; the remainder was to be paid to her niece Lilly May O'Brien and to her nephew James A. Freel, share and share alike; and she appointed her brothers Dr. Sylvester L. Freel and Dr. Ira A. Freel her executors.

On the 27th August, 1907, she executed the following document, written by her under the said will and upon the same sheet:

"I hereby revoke the above, and give to my sister Elizabeth Arvilla Robinson all the money I possess save the legacy named above to my nephew E. B. F. Robinson."

This was witnessed by Wesley Robinson, the husband of Elizabeth Arvilla Robinson, and Marion Robinson, the wife of E. B. F. Robinson.

The testatrix died on the 4th October, 1908.

The executors, under the belief that the document was ineffective by reason of Wesley Robinson, the husband of Elizabeth Arvilla Robinson, being one of the witnesses, applied to the Surrogate Judge for probate of the original will only; and an order was made for its proof in a solemn form.

Mrs. Elizabeth Arvilla Robinson was called as a witness. She stated that the testatrix lived with her up to the time of her death, and that, after the testatrix had executed the document, she told the witness that, as her brother was dead, he would not need the money, and she wished witness to have it.

The judgment of the learned Surrogate Judge, after setting out the documents and evidence, was as follows:—

"The evidence, in my opinion, clearly established the fact

that the testatrix intended to revoke her will for the purpose of increasing the devise to her sister Mrs. Robinson, and for no other purpose; that her intention has been ineffectual by reason of the witnessing of the codicil by those whose relationship to the devisees renders void the devises to them, under sec. 17 of the Wills Act of Ontario, R.S.O. 1897, ch. 128.

I had a similar question under consideration in *Re Tuckett* (1907), 9 O.W.R. 979. The execution in that case was duly witnessed, but, unfortunately, the witness was the husband of the devisee, and that rendered ineffectual the devise, which was to the same person as the devisee in the former will. I held in that case that the facts sworn to indicated that the later will was intended to take the place of the earlier one, and that the earlier one was only revoked on the supposition that the latter one was effective; and, it not being effective, the earlier will was not then revoked. Following the decisions referred to in my judgment, I directed letters probate of the earlier will to issue.

For the reasons set forth in the different cases referred to in *Re Tuckett*, I now direct letters probate of the will of the 18th August, 1904, to issue.

Costs of all parties to be paid out of the estate."

From this judgment the official guardian appealed to a Divisional Court.

On April 19th, 1909, the appeal was heard before FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

*J. R. Meredith*, for the official guardian.

*J. W. McCullough*, for the defendants.

*James McCullough*, for the executors.

May 4. The judgment of the Court was delivered by RIDDELL, J.:—Ada Freel, by a holograph will made in 1904, gave to her executors all her estate in trust to pay debts, etc., then to pay to Elizabeth A. Robinson, her sister, \$1,000; to her brother Byron, \$700; to her nephew E. B. F. Robinson, \$100; and the residue to her sister Elizabeth A. Robinson, with a provision for payment to her niece Ada B. Robinson and her nephew E. B. F. Robinson of any part of Mrs. Robinson's legacy unpaid at her death, and a like provision for the amount left to Byron Freel.

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On the 27th March, 1907, she, upon the same paper, made the following, also holograph, as her will:—

“I hereby revoke the above and give to my sister Elizabeth A. Robinson all the money I possess save the legacy named above to my nephew E. B. F. Robinson.

“Made this twenty-seventh day of August, in the year of our Lord, one thousand nine hundred and seven.”

This was executed by her as her will, and witnessed by Wesley Robinson and Marion Robinson.

Unfortunately for the effect of this as a will, Wesley Robinson is the husband of Elizabeth A. Robinson, and Marion Robinson the wife of E. B. F. Robinson.

Judge Winchester took evidence, and came to the conclusion that the whole object of the last will was to benefit Elizabeth A. Robinson, and, as this could not be effective by reason of her husband acting as a witness, the doctrine of dependent relative revocation applied, and the original will remained wholly valid and unrevoked. He accordingly decreed the admission to probate of the original will, and refused probate of the later will.

One of the next of kin not named in the wills now appeals.

The learned Surrogate Judge followed a previous decision of his own, *Re Tuckett*, (1907) 9 O.W.R. 979; and it must be conceded that if the decision in that case is sound, this appeal should fail.

I am of opinion that the *Tuckett* case is not well decided, and should be overruled.

The doctrine of dependent relative revocation, in strictness, is applicable only to a case of physical interference with a testamentary document with the intention of revoking it. Of the three methods by which a will may be revoked—(1) marriage; (2) will, codicil, or other paper; (3) burning, tearing, or otherwise destroying: R.S.O. 1897, ch. 128, secs. 20, 21, 22—the first does not depend upon intent; the second only under certain circumstances will justify parol evidence as to intent; the third depends wholly upon intent, and parol evidence may always be given of the intent. Sir J. P. Wilde, in *Powell v. Powell* (1866), L.R. 1 P. & D. 209, at p. 212, speaking of the doctrine of dependent relative revocation, says: “This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testa-

mentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done in the light of the circumstances under which it occurred and the declarations of the testator with which it may have been accompanied. For, unless it be done *animo revocandi*, it is no revocation." And, consequently, from an early period it has been held that if a testamentary document be physically destroyed or mutilated because the testator believes that he has made an effective disposition of his estate by a subsequent document, if such subsequent document turns out to be wholly ineffective, the former document is held not to have been revoked. Since the case of *Re Applebee* (1828), 1 Hagg. 143, 144, the doctrine has been extended to the case of a document having been destroyed, etc., as a preliminary to the making of a new one: *Re Mitcheson* (1863), 32 L.J.N.S.P.M. & A. 202.

Many cases have been cited under the same head, in which the testator destroyed the will, etc., under the belief that it was invalid, *e.g.*, *Giles v. Warren* (1872), L.R. 2 P. & D. 401, *Re Thornton* (1889), 14 P.D. 82, etc. No advantage is to be derived from a too nice distinction between the two classes of case, the legal result being the same. Strahan's Law of Wills (ed. 1908), p. 57, may be referred to on the whole question.

In cases, however, in which the revocation is by a subsequent document and not some physical act, the rule is different. If there be by a subsequent document an express unambiguous revocation, the intent of such revocation can be found only by an examination of the words of the subsequent document itself.

In *Thorne v. Rooke* (1841), 2 Curt. 799, at pp. 811, 812, is considered the principle on which the Court proceeds with respect to papers having no express revocation. At p. 811 Sir Herbert Jenner says: "I apprehend, that in all these cases, the Court, in the first instance, must look to the papers themselves in order to discover whether there is anything in the nature of ambiguity, or any absurdity arising out of insertion or omission—which you please; and if it should find that the papers themselves, by necessary implication, or from an ambiguity raised on the contents of the instruments, shew that it was not the intention of the deceased that they were to operate, then the Court

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may admit parol evidence to remove that difficulty. . . . It is not, without there is some doubt, some ambiguity, or some absurdity arising from an insertion or omission, that this Court interferes to pronounce that the declaration of the one is revocatory of the other, or holds that it is a substitution of the other."

Such a case is *Methuen v. Methuen* (1817), 2 Phill. (Ecc.) 416, p. 426: "It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence."

The decision in *Thorne v. Rooke* is approved by Sir James Hannen, in *Jenner v. Finch* (1879), 5 P.D. 106, 111.

So that, even if there had been here no express revocation, as there is, the parol evidence would not have been admissible. See also *Re Gentry* (1873), L.R. 3 P. & D. 80.

Then it is simply the case of interpreting the documents by their contents, and there can be no doubt that the later document effectually revokes the former. The new disposition would, were it not for the one witness being the husband of Elizabeth A. Robinson or the other the wife of E. B. F. Robinson, be to give E. B. F. Robinson the sum of \$100 and the remainder to Elizabeth A. Robinson. The will, as it stands, must be interpreted as though it were wholly effective, and then the legacies declared void: *Aplin v. Stone*, [1904] 1 Ch. 543; *Re Maybee* (1904), 8 O.L.R. 601, 603. The will in itself is perfectly valid; the only difference between its present effect and the effect it would have had had it not been witnessed as it has been is that the bequests are utterly null and void.

Even if the later document had contained a declaration of the reason of the revocation, the result would, I think, be the same—where the substituted legatee fails, by reason of incapacity in himself to take, the revocation is still wholly effective: *Tupper v. Tupper* (1855), 1 K. & J. 665; *Quinn v. Butler* (1868), L.R. 6 Eq. 225.

Here the only thing which prevents Elizabeth and E. B. F. Robinson from taking is their relationship to one or other of the witnesses. If there were some "clerical rule," as it is called in *Perrott v. Perrott* (1811), 14 East 423, at p. 440, which prevented the document being effective to deal with the particular property, the case might be different. See also *Beard v. Beard* (1744), 3 Atk. 72.

I have not thought it necessary to say anything of the juris-

diction of the Court to declare a will made under an erroneous assumption of facts to be invalid—an entirely different head. See Williams on Executors, 9th ed., pp. 146 *et seq.*

The revocation is also a revocation of the appointment of executors: *Henfrey v. Henfrey* (1840), 2 Curt. 468; *S.C.* (1842), 4 Moo. P.C. 29; *Cottrell v. Cottrell* (1872), L.R. 2 P. & D. 397.

The appeal should be allowed. Letters of administration may be granted, with the wills annexed. The estate will be divided as upon an intestacy. We are told that the executors are desirous of the attempted disposition being carried out—nothing will stand in the way of their donating their shares to the disappointed legatees, but they cannot give away the property of others.

As the trouble has been caused by the act of the testatrix herself, the costs of all parties here and below should come out of the estate as between solicitor and client.

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RE DICKS.

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March 8.

*Life Insurance—R.S.O. 1887, ch. 136, sec. 6—51 Vict. ch. 22, sec. 3 (O.)—53 Vict. ch. 39, sec. 6 (O.)—Children and Grandchildren—Apportionment by Policy—Variance by Will.*

M.D. effected policies of insurance upon her life, under which the insurance money upon her death was payable to her “surviving children share and share alike.” By her will dated the 10th December, 1894, she directed her trustee to invest the insurance moneys, and the other proceeds of her estate, and, after provisions for the maintenance and advancement of her children, directed that as soon as the youngest should have attained the age of twenty-one years, the trustee should divide the money, or so much as might then remain, among her “children then surviving or the issue of any child or children deceased:”—

*Held*, that, under the statutes in force at the date of the will, the testatrix had no power to take insurance money that had been apportioned to children, and to give it to grandchildren, and that one of the adult children was entitled to have his share of the fund paid out to him, notwithstanding the fact that all the children had not attained the age of twenty-one years. *Re Grant* (1895), 26 O.R. 120, followed.

APPLICATION, under Con. Rule 938, by Frederick Dicks, one of the adult children of Mary Dicks, for payment out to him of his share of certain moneys which, under two policies of insurance upon the life of the said Mary Dicks, were made payable upon her



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death to her "surviving children share and share alike," and for the construction of the provisions of the will of Mary Dicks as to the insurance moneys.

The motion was argued before TEETZEL, J., in Weekly Court, on the 11th February, 1909.

A. J. R. Snow, K.C., for the applicant and the other adult children of Mary Dicks.

F. W. Harcourt, K.C., for her infant children.

E. A. Forster, for the trustee under the will of Mary Dicks.

R. L. Defries, for the Toronto General Trusts Corporation.

March 8. TEETZEL, J.:—Under the two policies of insurance upon the life of Mary Dicks, for \$5,000 each, dated respectively the 30th January and the 27th February, 1894, the insurance money upon her death was payable to the assured's "surviving children share and share alike."

She died on the 2nd March, 1895, and by her will, dated the 10th December, 1894, she appointed her husband trustee to receive all the moneys payable under the two policies and others, describing them, and, after declaring them to be for the benefit of her children, directed that her husband should hold the insurance moneys and the other proceeds of her estate upon the following trusts:—

(1) "To pay my just debts and funeral and testamentary expenses.

(2) "To invest the proceeds thereof in securities of the Dominion of Canada or Province of Ontario, or in mortgages on real estate or stocks of chartered banks or building societies or loan companies, and to apply the annual income arising therefrom in the support of our children, and, should my said husband deem it necessary and advisable, he shall be at liberty to apply the corpus of my estate in the education, maintenance, and advancement of the said children or any of them, and as soon as the youngest of my children shall have attained the age of twenty-one years, my said husband shall divide the said sum, or so much thereof as may then remain, in equal shares *per stirpes et non per capita* among my children then surviving, or the issue of any child or children deceased."

Then follows a provision that, if all the children die before attaining twenty-one without issue, what may remain of the moneys

shall go to the husband absolutely; but in case any of them leave issue, the issue shall inherit in equal shares.

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The application is made by Frederick Dicks, a son, for an order directing that the sum of \$1,160, now in the hands of the Toronto General Trusts Corporation, being his share of the balance on hand, should be paid out to him, notwithstanding that all the children of Mary Dicks have not yet attained twenty-one years of age.

The contention of the applicant is that, under the terms of the policy, he and the other children, on the death of the mother, had a vested interest in the insurance moneys, and that the provisions of the will postponing his absolute interest until the youngest child should attain twenty-one years of age, when the money should be divided *per stirpes*, were beyond the power of the testatrix under the law in force at her death.

In the first place, I think the provisions of the will are not a mere apportionment, or an alteration of the apportionment of the insurance moneys, but are a variation of the terms of the policy. Under the policy, the applicant, upon the death of his mother, was entitled to a vested interest in the insurance money; while, under the will, his interest, other than the provision for his maintenance, etc., is made contingent upon his surviving the time when the youngest child should attain the age of twenty-one years, and thereby deprives him of the right of disposing of his interest, and gives the same to his child or children should he leave any, otherwise to his surviving brothers and sisters.

Under the law as it stood at the death of the testatrix there was no provision for an assured taking insurance money that had been apportioned to children, and giving it to grandchildren.

The statutes in force at that date were R.S.O. 1887, ch. 136, sec. 6, as amended by 51 Vict. ch. 22, sec. 3, and as again amended by 53 Vict. ch. 39, sec. 6.

As held in *Re Grant* (1895), 26 O.R. 120, there is in the section as amended a clear distinction drawn between an "instrument in writing" and a will, and between what the insured may do by an instrument in writing and what he may do by his will.

By his will he is only empowered "to make or alter the apportionment of the insurance money," and it does not empower him to declare that others than those for whose benefit he has effected

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the insurance, or for whose benefit he has declared the policy to be, shall be entitled to the insurance money, or to apportion it among others than those for whose benefit he has effected the policy, or for whose benefit he has declared it to be.

See also *McIntyre v. Silcox* (1899), 30 O.R. 488; *Scott v. Scott* (1890), 20 O.R. 313; and *Cartwright v. Cartwright* (1906), 12 O.L.R. 272.

I think these authorities clearly establish that at the date of the will in this case the law did not permit the testatrix by will to do other than apportion or alter the apportionment of the insurance money among those for whose benefit it was effected, while in this case it seems to me she has gone further, and sought to vary the apportionment by converting an absolute into a contingent interest, and by apportioning the share of any child who should die before the period fixed for distribution, among her grandchildren.

The order will, therefore, be that the applicant is now entitled to be paid the balance of his share. Costs of all parties out of the trust fund.

G. G.

[MEREDITH, C.J.C.P.]

RE NORTH PERTH DOMINION ELECTION.

MONEY V. RANKIN.

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March 11.

*Parliamentary Elections—Dominion Controverted Elections Act—Preliminary Objections—Petition Presented too Late—Application to Extend Time—Jurisdiction—R.S.C. 1906, ch. 7, secs. 5, 12, 13, 87.*

The petition was delivered to the registrar, not at his office, but at his residence, after office hours, on the last day upon which, according to sec. 12 of the Dominion Controverted Elections Act, it could be filed:—

*Held*, that the petition was presented too late.

The *North Bruce Case* (1891), 27 C.L.J. 538, distinguished.

The Court has no power to extend the time for presenting a petition after the expiration of the time for presenting it prescribed by the Act has elapsed, and to such a case sec. 87 of the Act has no application.\*

The principle of the *Glengarry Case* (1888), 14 S.C.R. 453, applied and followed.

SUMMARY trial of the preliminary objections filed by the respondent to the petition against his return, and motion by the petitioner for an order extending *nunc pro tunc* the time for presenting the petition until the 7th December, 1908, and for an order confirming and declaring presented, within the time so extended, the petition, and confirming *nunc pro tunc* the service of the petition and all subsequent proceedings thereon.

The trial took place before MEREDITH, C.J.C.P., on the 1st March, 1909.

*G. F. Shepley*, K.C., and *R. T. Harding*, for the respondent.

*James Bicknell*, K.C., and *J. W. Bain*, K.C., for the petitioner.

March 11. MEREDITH, C.J.:—The petition was delivered to the registrar on the last day upon which, according to the provisions of sec. 12 of the Dominion Controverted Elections Act, a petition against the return of the respondent could be filed. The petition was not delivered at the office of the registrar, but at his residence and after office hours, three hours and twelve minutes after his office had been closed; and, upon receiving it and the prescribed deposit, the registrar indorsed on the petition the following memorandum: "Received at 4.12 p.m. on 5th December, 1908

\* R.S.C. 1906, ch. 7, sec. 87: The Court shall, upon sufficient cause being shewn, have power, on the application of any of the parties to a petition, to extend, from time to time, the period limited by this Act, for taking any steps or proceedings by such party.



Meredith, C.J. (after office closed), at my house"; and the petition was treated and  
1909 was marked by him as filed on the 7th December, 1908.

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The respondent objects that the petition was not presented within the time limited by sec. 12, and it is conceded by the petitioner that, if it is to be treated as presented on the 7th December, it was presented too late, and that the objection is entitled to prevail unless the Court has power now to enlarge the time for presenting it, and the time is extended by the Court.

Dealing first with the preliminary objection, it is, in my opinion, quite clear that the petition was not presented in time, the last day for presenting it being, as I have said, the 5th December, 1908.

By sec. 5 the petition is to be presented to the Court, and sec. 13 deals with the manner of presenting it. Section 13 provides as follows:—

"13. Presentation of a petition shall be made by delivering it at the office of the clerk of the Court, during office hours, or in any other prescribed manner."

"Prescribed manner" means prescribed by the Act or by rules of Court made under it—sec. 2 (g)—and there is no other provision in the Act and no rule of Court dealing with the matter.

Reading secs. 5, 12, and 13 together, it is, I think, quite clear that a person desiring to question an election must present to the Court his petition within the time prescribed by sec. 12, and that he must do so by delivering it within the time at the office of the registrar during office hours.

I do not agree with the argument of the petitioner's counsel that the purpose of sec. 13 is to allow to the petitioner an alternative mode of presenting the petition, that is to say, to enable him to file it at any time during the last day by delivering it to the registrar, whether at his office or elsewhere, as it was argued he might do in the case of a pleading in an action, or as allowed by sec. 13, by delivering it at his office during office hours, whether or not he or any one else is in attendance there.

The language of the section is imperative—"shall be made," not, "may be made"—and in my opinion no Court has the right to say that it may be made in any other manner than that mentioned in the section, or that prescribed by a rule of Court made under the authority of the Act.

The jurisdiction of the Court is purely statutory, and the provision of sec. 12 as to time is, besides, as Mr. Shepley argued, in the nature of a statute of limitation.

The *North Bruce Case* (1891), 27 C.L.J. 538, is quite distinguishable. In that case the petition was delivered to the registrar at his office, but not, if standard time governed, during office hours; and Mr. Justice Maclellan held that solar time governed, and that according to it the petition was delivered during office hours, and he also expressed the opinion that the rule which provided that the office of the Court should be kept open from 10 a.m. to 3 p.m. was directory only, and that had standard time governed, as the petition was delivered to the registrar at his office, though after office hours, while it was still open, it was in time.

It is unnecessary to say whether or not I agree with this latter view, for it is enough to point out that the petition in this case was not delivered at the office of the registrar, and that when it was delivered to him at his residence his office was not open, but had been closed for more than three hours.

The objection must be allowed with costs.

Now as to the petitioner's application.

The fact that no case can be found, either in England or in Canada, in which the time for presenting a petition has been extended, or in which an application for that purpose has been made, is almost if not quite conclusive against there being any power in the Court to extend the time which the statute prescribes.

When the House itself dealt with election petitions, the practice as to requiring the petition to be presented within the time limited by the Orders of the House was strict: Rogers on the Law of Elections, 9th ed., p. 429 *et seq.*

The cases on applications for leave to amend a petition after the time for presenting a petition has expired are conclusive against the petitioner.

Section 2 of the English Parliamentary Elections Act, 1868, is similar in its terms to sub-sec. 2 of sec. 2 of the Dominion Controverted Elections Act, which gives, subject to the provisions of the Act, to the High Court, the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as if the petition were in an ordinary cause.

Notwithstanding this provision, it has been held in England

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that the Court cannot amend a petition by introducing a substantially new charge after the time for presenting a petition has elapsed, as that would make it in effect a new petition, and thus defeat the provisions of the Act requiring a petition to be presented within the prescribed time: Rogers on Elections, 18th ed., p. 212, and cases there cited; and the same conclusion has been reached by our Courts, though I have not been able to find any reported case on the point.

Section 87, of which there is no counterpart in the English Act, was relied on by Mr. Bicknell, but it has, in my opinion, no application. Whatever may be its scope, it clearly applies only where a petition has been presented in due time and is on the files of the Court.

It formed sec. 43 of the Act 37 Vict. ch. 10 (D.), and is there found under the heading "Procedure." It is found in the Revised Statutes of 1886, ch. 9, as sec. 64, under the heading "General Provisions," and appears in the present revision under the heading "General."

These changes in its position have effected no change in the meaning of the section as it appeared in 37 Vict.: *Farquharson v. Imperial Oil Co.* (1899), 30 S.C.R. 188; and, reading it as it appears there, it is applicable only to procedure, and, in my opinion, to procedure after a petition has been duly presented.

The same reasoning which led to the decision in the *Glengarry Case* (1888), 14 S.C.R. 453, is, I think, applicable here. There the Court held that, after the expiration of the six months allowed for bringing a petition to trial, there was no petition in respect of which the power to extend the time could be exercised. Here there never has been a petition in Court, and therefore there is nothing in respect of which the power conferred by sec. 87 can be exercised.

The motion must be refused with costs.

G. G.

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## [IN THE COURT OF APPEAL.]

## SOVEREIGN BANK OF CANADA V. PARSONS.

C. A.

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*Pleading—Counterclaim—Receivers and Managers under Order of Court—Proceeding against, without Leave of Court—Motion to strike out Counterclaim—Appeal on Matter of Procedure—Con. Rule 251.*

Mar. 16.

Mar. 27.

Apr. 13.

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Jan. 19.

A paper manufacturing company having become financially embarrassed, J.C. and G.E. were appointed by the Court joint receivers and managers to carry on the business of the company on behalf of debenture holders to whom its property and assets had been mortgaged. Previously to this appointment the company had entered into contracts with the defendants to supply them with paper at certain prices for certain periods of time, and after their appointment it was alleged that J.C. and G.E. had continued to deal with the defendants under these contracts, and other contracts into which J.C. had entered at a time when he was acting as sole receiver and manager. J.C. and G.E. at various times assigned the indebtedness of the defendants under these contracts to the plaintiffs, who brought this action to enforce payment. The defendants thereupon set up a counterclaim, adding J.C. and G.E. as defendants thereto, and alleging that J.C. and G.E. had wrongfully terminated these contracts at a time when they were in full force, on which account the original defendants were obliged to enter into contracts with other manufacturers of paper at a greatly increased price, whereby they suffered and would suffer damages greatly in excess of the amount claimed by the plaintiffs, which damages they claimed to set off against the claim of the plaintiffs to the extent of that claim, and they counterclaimed for the balance of their damages against J.C. and G.E.:—*Held*, affirming the orders of MEREDITH, C.J.C.P., and a Divisional Court, that the counterclaim should be struck out as against J.C. and G.E., but that the original defendants should be at liberty to amend their pleadings so as to make the counterclaim a defence to the action.

Remarks upon the difference in scope between Con. Rule 251 and the corresponding English Rule 199.

*Seem*, that an appeal did not lie to the Court of Appeal against the order of the Divisional Court, the matter being one of procedure only, not affecting the ultimate rights of the parties.

APPEAL by the defendants in the action from an order of a Divisional Court, dated the 11th April, 1908, dismissing an appeal from an order made by MEREDITH, C.J., in Chambers, dated the 27th March, 1908, setting aside an order made by the Master in Chambers, dated the 16th March, 1908, dismissing a motion made by the defendants by counterclaim to strike out the counterclaim.

The Imperial Paper Mills of Canada Limited, an incorporated company carrying on the business of paper manufacturers, entered into various contracts to supply paper to William H. Parsons and others, the defendants in the action, among which were a number of contracts extending over three years from the year 1905. Prior to that year the company had mortgaged its whole property



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and assets to trustees for debenture holders to secure an issue of £200,000 sterling of debentures. John Craig and George Edwards, the defendants by counterclaim, were joint receivers and managers of the company, on behalf of the debenture holders, and, as alleged by the original defendants, continued to carry out the contracts and entered into new contracts with these defendants, under which the said Craig and Edwards supplied them with paper until the 17th June, 1907, when they notified the Parsons firm that they would not continue to do so any longer, by which action the defendants claimed that they suffered damage.

This action was brought by the plaintiffs to recover from the defendants certain sums alleged to be due and owing from them under their contracts, and to have been assigned to the bank by the receivers and managers of the company. The defendants in the action claimed to set off their damages against the bank, and counterclaimed for the balance of their damages against the receivers and managers. The other facts are set forth in the judgments.

The motion to strike out the counterclaim was argued before the MASTER IN CHAMBERS on the 12th March, 1908.

*R. B. Henderson*, for the defendants by counterclaim.

*W. J. Boland*, for the plaintiffs.

*G. L. Smith*, for the original defendants, the Parsons firm.

March 16, 1908. THE MASTER IN CHAMBERS:—The statement of claim alleges that the defendants, who are paper merchants in New York, bought from Craig and Edwards at various times, as managers and receivers of the Imperial Paper Mills, between the 1st May and the 20th June, 1907, goods to the value of \$15,000, after crediting all payments on account.

It further alleges that such indebtedness of the defendants was on the 9th October, 1907, duly assigned to the bank, and that notice in writing of the same was sent by registered letter to the defendants.

The plaintiffs ask payment of \$15,028 and interest, as being the amount owing to them by the defendants.

To this was delivered a statement of defence and counterclaim, which sets out that the defendants had for two or three years been dealing with the Imperial Paper Mills prior to the 27th

October, 1906, when Craig was appointed receiver and manager; that Craig assumed and adopted contracts then subsisting between that company and the defendants, and continued the same and entered into fresh contracts up to the 9th January, 1907, when Edwards was associated with him as joint receiver and manager; that Craig and Edwards thenceforth carried out such contracts until the 17th June, 1907, when, the said contracts being still in full force, they notified the defendants that they would not continue to supply them with paper, and ceased to do so thereafter.

The defendants then counterclaim against the bank, and Craig and Edwards, for damages for such alleged breaches of contract on the part of Craig and Edwards, and they say that such damages should be set off against the plaintiffs' claim to the extent thereof, and that they should recover the excess from Craig and Edwards.

This counterclaim the added defendants move to have stricken out.

The plaintiffs claim as assignees of certain choses in action. They therefore hold them subject to all their equities, and they can take no more than Craig and Edwards could have recovered. And the claim now made for damages would have been a good *prima facie* defence to this action if it had been brought by them.

If I rightly understood the argument presented in support of the motion, it was really in the nature of a demurrer, the contention being that Craig and Edwards, being in fact receivers and managers under the orders of the Court, could not be proceeded against personally for anything done by them as such receivers, and could not be attacked as receivers without the leave of the Court.

If that is the ground taken by them, it is plain that such a motion must be made to a Judge in Court under Rule 261. This was the decision on this point of the late Mr. Justice Street in *Knapp v. Carley* (1904), 7 O.L.R. 409, where the difference between the English practice and ours in this matter is pointed out.

On the ground of convenience there does not seem to be any reason for granting the motion at present. The pleadings have not reached the stage at which this can be properly decided. The alleged counterclaim most undoubtedly arises out of the dealings

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of the defendants and the receivers. It is therefore not only permissible, but seems to be in compliance with sub-sec. 12 of sec. 57 of the Judicature Act. That most beneficial enactment requires the Court in every cause so to act, that, as far as possible, all matters in controversy between the parties may be determined therein, and all multiplicity of legal proceedings concerning any of such matters avoided.

It therefore follows that the motion must be dismissed with costs in the counterclaim in any event to the defendants as against the movers.

The defence to the counterclaim should be delivered in a week.

The defendants by counterclaim appealed from this decision to a Judge in Chambers, and the motion was argued by the same counsel on the 27th March, 1908, before MEREDITH, C.J.C.P., who delivered the following judgment at the close of the argument.

March 27, 1908. MEREDITH, C.J.:—I think this order must be reversed. The plaintiffs are suing as assignees of a chose in action, which is a claim by the Imperial Paper Company, or the manager and liquidators of that company, against the defendants, for paper sold and delivered under the terms of a contract between them and the defendants.

The defendants set up as a defence that the liquidators, Craig and Edwards, assumed certain contracts which had been entered into between the defendants and the company, and that there have been breaches of that contract in the refusal to supply paper, the result of which is, as the defendants plead, that they are entitled to claim damages, either from Craig and Edwards or from the company, for the breach.

No doubt the effect of sec. 58, paragraph 5, of the Judicature Act is that an assignee of a chose in action takes subject to all the equities which would have been entitled to priority over the right of the assignee if the section had not been enacted.

Under the English Rule 199, "a defendant in an action may set off, or set up, by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable

the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." But the Court or a Judge may, on the application of the plaintiff before trial, if of opinion that the "set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

Our Rule 251 is much narrower than that—I think the change was made in 1888—"A defendant may set up by way of counterclaim, against the claim of the plaintiff, any right or claim whether the same sounds in damages or not."

It will be observed that the words "may set off" are omitted, and therefore clearly, as was determined by Mr. Justice Ferguson in *Chamberlain v. Chamberlin* (1886), 11 P.R. 501, the set-off would only be such set-off as existed under the old statutes—a set-off of mutual debts, though that does not appear, as I read the English cases, to be quite the view taken under the English Rule.

In *Young v. Kitchen* (1878), 3 Ex. D. 127, the head note is: "The statement of claim alleged that the plaintiff sued as assignee by deed, of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counterclaim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—*Held*, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly."

In the course of the argument, Mr. Baron Cleasby said: "The Judicature Act, 1873, sec. 25, sub-sec. 6 (1)," which is substantially the same as sec. 58, sub-sec. 5 of our Act in regard to the assignment of a debt or chose in action, "says that the assignment of a debt or other legal chose in action shall be 'subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,' that is, subject to all equities which would be enforced in a Court of equity.

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I think that this is a case where, in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings."

Then on a subsequent day he said: "In this case the principal question was disposed of upon the argument by holding that the defendant was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor. Another question remained, upon the form of the defence and counterclaim; and it rather appeared to me that the counterclaim was in such a form (claiming, as I thought it purported to do, damages against the plaintiff) that the 7th paragraph shewed no title to such a claim, and was therefore demurrable." Then he goes on to make some observations as to that, and proceeds: "The above objection would apply equally to the allegation of the 8th paragraph, which is not demurred to. And this rather shews that the plaintiff did not intend by his demurrer to rely upon this formal objection," etc. "The proper course is, I think, to overrule the demurrer, the costs to be costs in the cause, the defendant to be at liberty to amend his claim by shewing that he does not claim to recover damages against the plaintiff, but only to set them off against the plaintiff's claim."

So that under the English rule a defendant, in the position in which this defendant is, would be entitled to defend upon the ground that he has a claim, arising out of the same matter, and originating before the assignment, for damages which he is entitled to set off to the extent of the plaintiff's claim.

The whole of the decision is entirely against the view that it would be proper to bring in the assignor, and to litigate in an action by the assignee, the claim of the defendant against the assignor.

*Government of Newfoundland v. Newfoundland R.W. Co.* (1888), 13 App. Cas. 199, deals with this question on pp. 212 and 213, and the history of the law is given on p. 213. After citing the statement by Lord Romilly of the principle upon which the law is based, "All the debts sought to be set off against the defendant Parkes are debts, either actually due from him

at the time of the execution of the deed, or flowing out of and inseparably connected with his previous dealings and transactions with the firm," Lord Hobhouse says: "That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee, if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. It appears to their Lordships that in the cited case of *Young v. Kitchen* the decision to allow the counterclaim was rested entirely on this principle." It appears in this case that under the law of Newfoundland there is the right as against the assignee to set off unliquidated damages arising out of the same transaction.

In *Seyfang v. Mann* (1896), 27 O.R. 631, the head-note is: "By an agreement for the dissolution of a firm, it was provided that all claims and demands, notes, bills and book accounts belonging to the firm were to be collected by the plaintiffs, who were to be the owners thereof, and by virtue of which the plaintiffs sued defendant for a balance alleged to be due for goods sold and delivered by the firm to defendant, who set up a claim for damages for non-delivery of goods by the firm, which arose before the dissolution of the partnership:—*Held*, a valid assignment of a debt due by defendant to the plaintiffs; and that the defendant could set off the claim for damages arising by reason of a breach of the agreement under which the debt arose."

There is a discussion in the judgment of Chief Justice Armour as to the difference between the Imperial and the Ontario Choses in Action Act. At that time in this Province the provisions of the English Act had not been introduced, but what was in force was what was known as Mr. Hodgins's Act, an Act passed in 1872, which limited the right of the assignee to a greater extent than his right is limited by our Judicature Act. That is all pointed out by the Chief Justice, and was also pointed out by Mr. Justice Osler in *Exchange Bank v. Stinson* (1881), 32 C.P. 158.

The *Seyfang* case went to the Court of Appeal, and the judgment there proceeded upon a different ground. In the Court

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below judgment had been given against the assignees for a sum which much exceeded the amount of the claim. It was held in the Court of Appeal that novation had taken place—that a new contract had been made between the plaintiffs and the defendants—and the result of the judgment was to reduce the amount allowed on the counterclaim from \$2,500 to \$650: (1898), 25 A.R. 179, 190.

In *McLachlan v. Union Steamship Company of British Columbia* (1907), 10 Ex. C.R. 403, at p. 408, Mr. Justice Martin referred to the *Kitchin* case and the *Newfoundland* case, and came to the conclusion that he would not be justified in excluding the set-off in the circumstances of that case, “for they seem to me equitably to clearly entitle the defendants to a reduction of the mortgage, if they can be substantiated, and therefore an opportunity should be given them to do so.”

Now, I do not propose, in determining this interlocutory matter, to decide whether there is any right of set-off in respect of a claim for unliquidated damages. I leave that entirely open; but I allow the appeal on the ground that, if there is such a claim, it is a defence to the action, and the proper way of bringing it forward is by pleading it as a defence and not as a counterclaim; and it follows that there would be no ground whatever for, as I think there would be no convenience served, by bringing in Craig and Edwards, and having litigated between them and the defendants the claim which they make against them for damages.

[On counsel for the defendants asking if leave would be given to bring a cross-action and to amend the defence.]

There would be no object in saying that the order is without prejudice to an action for the damages sought by the counterclaim.

Then the appeal will be allowed with costs to the appellants. The costs to plaintiffs will be to them in any event, here and below, and with leave to the defendants to amend their statement of defence within ten days, that will be to amend their statement of defence within ten days by striking out the counterclaim and making it a defence to the action. The defendants may amend, of course, by making it clear that it is the same contract

that they are claiming damages in respect of, as that on which they are being sued.

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From this judgment the defendants the Parsons firm appealed to a Divisional Court, and the appeal was heard before MULOCK, C.J. Ex.D., TEETZEL and MAGEE, JJ., on the 6th April, 1908.

*W. E. Middleton, K.C., and G. L. Smith, for the appellants.*

*R. B. Henderson, for the defendants by counterclaim.*

*R. A. Reid, for the plaintiffs.*

April 13, 1908. TEETZEL, J.:—The judgment appealed from directed the counterclaim to be struck out, on the ground that, if there was a claim for damages as set up by the defendants, it afforded a defence to the action, and should be pleaded as a defence, and not as a counterclaim, and that it was not convenient or proper to have the claim of the defendants against Craig and Edwards, receivers, litigated in this action.

In my opinion a more serious difficulty lies in the defendants' way than that discussed by the learned Chief Justice.

On the undisputed facts I think the defendants' claim for damages cannot attach upon or be satisfied out of the claim assigned to the plaintiffs, and that, if the defendants are entitled to recover, it must be solely from Craig and Edwards personally, in which case the attempt to introduce them in this action, by way of counterclaim against them, would be clearly irregular: *Macdonald v. Carington* (1878), 4 C.P.D. 28.

Craig and Edwards are receivers and managers appointed by the Court in an action by debenture holders of the Imperial Paper Mills of Canada Limited.

By order of the 27th October, 1906, Craig was appointed receiver, on behalf of all of the said debenture holders, of all the undertaking, capital stock, goods, chattels, effects, and other real and personal property of the company, comprised in or subject to the security and charge created by its debentures, and to manage the business of the company; and he was also by the order authorized to borrow a sum not exceeding \$40,000, which was declared to be a first charge upon the undertaking and assets of the company.

By an order of the 10th December, 1906, he was further



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authorized to obtain upon the sale and pledge of book accounts and commercial paper a sum not exceeding \$50,000.

By an order of the 9th January, 1907, George Edwards was appointed joint receiver and manager with John Craig, who were to be at liberty to continue the business of the Imperial Paper Mills of Canada Limited, "and to pay all outgoings and to do all other acts necessary for that purpose, but nothing herein contained shall authorize the receivers to borrow money for the purpose of carrying on the business to a greater extent than \$40,000, as already provided by the order of the Court, and the receivers and managers shall not incur debts or liabilities in such a manner and to such an extent as to ultimately create a charge on the property and assets of the company in excess of \$40,000, in priority to the charge and lien, if any, of the debenture holders . . . without leave of the Court," etc.

Upon the argument, Mr. Middleton, for the defendants, candidly admitted that his claim for damages for the alleged breach of contracts set up in his counterclaim would be against the receivers personally, and in support of that position cited *Burt v. Bull*, [1895] 1 Q.B. 276; but he based his right to counterclaim on the contention that the receivers had adopted as their own certain contracts which had been entered into between the Imperial Paper Mills of Canada Limited and the defendants, and had made new contracts with the defendants for the supply of paper; and that on the 17th June, 1907, Craig and Edwards, in alleged breach of the said contracts, notified the defendants that they would not continue to supply them with paper according to the terms thereof, and the damages claimed are for this breach.

The plaintiffs' claim against the defendants, which was assigned to them by the receivers, is for the price of paper supplied by the receivers to the defendants prior to the 17th June, 1907.

The position of a receiver and manager appointed by the Court is discussed by Lord Esher in *Burt v. Bull*, *supra*, at p. 279: "What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him, or give him directions as to the mode of carrying on

the business, or interfere with him, if he is not carrying on the business properly. The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is, of course, impossible to suppose that the relation of agent and principal exists between him and the Court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must *primâ facie* be taken to be orders given on his own responsibility and credit." Then, again, at p. 281: "It seems to me that the parties receiving such an order must know that they could not go to the Court for payment, and therefore they would supply the goods on the personal credit of those giving the order."

See also Lindley's Law of Companies, 6th ed., p. 332; Palmer's Company Law, 5th ed., p. 280; Kerr on Receivers, 5th ed., pp. 228, 280.

If the receiver is personally liable for the price of goods supplied for the purpose of his receivership, it follows that he must be personally responsible for breaches of contract entered into by him.

The position in this case, therefore, is that on the 17th June the defendants had become indebted to the receivers in their official capacity for goods supplied, and that such indebtedness formed a portion of the assets which the receivers were in possession of for the debenture holders under the orders above recited, and that, without the sanction of the Court or express authority of the debenture holders, this indebtedness could not be applied in satisfaction of a personal liability of the receivers.

Another way of describing the situation is that on the 17th June the defendants were indebted to the receivers in their capacity as officers of the Court, and at the same time the defendants claim to have a right to recover damages from the receivers personally for breach of contract. The claims being in different capacities, the counterclaim cannot be permitted.

The appeal will be dismissed with costs.

MULOCK, C.J., and MAGEE, J., concurred.

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From this judgment the defendants appealed to the Court of Appeal, and the appeal was argued on the 30th November and 1st December, 1908, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*I. F. Hellmuth*, K.C., *W. E. Middleton*, K.C., and *G. L. Smith*, for the appellants. The reasons assigned by Meredith, C.J., for striking out the counterclaim are quite different from those assigned by the Divisional Court, and the former appears to have taken too restricted a view of the scope of Rule 251, and to have overlooked the effect of sub-sec. 7 of sec. 57 of the Judicature Act. The cases of *Young v. Kitchin* and of *Government of Newfoundland v. Newfoundland R. W. Co.*, cited by him, are not in point, as in neither of these cases was the assignor before the Court. The judgment of the Divisional Court is on a quite different ground, and is to the effect that the appellants cannot succeed at all. The receiver is not bound as such by the contracts, but becomes so by assuming them and making new contracts. The statute under which the assignee takes the benefit makes him also liable to the burden: *In re Brooke*, [1894] 2 Ch. 600; *Exchange Bank v. Stinson* (1881), 32 C.P. 158.

*R. B. Henderson*, for the defendants by counterclaim. The receiver is personally liable on his contracts, and has a right of indemnity against the assets, to which the plaintiff can be subrogated: *In re British Power Traction and Lighting Co.*, [1906] 1 Ch. 497, at p. 500. If these defendants have any rights such as they claim, they can assert them in the receivership action. The real question is whether the appellants can set off a personal liability of the receivers against the receivership assets: Kerr on Receivers, 4th ed., pp. 166, 185; Palmer's Company Precedents, part III., 10th ed., p. 675. As to the novation alleged by the appellants, the following authorities were cited: *Robson v. Smith*, [1895] 2 Ch. 118; *Norton v. Yates*, [1906] 1 K.B. 112; Palmer's Company Precedents, pp. 69, 78, 79.

*W. J. Boland*, for the plaintiffs, contended that they should not be delayed in proceeding with their action, and that the record should not be encumbered by issues between the defendants and third parties.

*Hellmuth*, K.C., in reply, referred to *In re Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365, at p. 378; *Forster v. Nixon's Navi-*

*gation Co.* (1906), 23 Times L.R. 138; *In re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342, at p. 345; *In re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548, at p. 552; *Rodgers v. Rodgers* (1867), 13 Gr. 457, at p. 463.

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January 19. Moss, C.J.O.:—The appeal in this case is from an order of a Divisional Court affirming an order made by Meredith, C.J., upon an appeal from the Master in Chambers.

A short history of the case will suffice to shew the circumstances under which the case came before the Master.

The Imperial Paper Mills Co. Limited, carrying on the business of paper manufacturers, entered into various contracts to supply the defendants Parsons, who are paper merchants, with paper of the quality and quantity, for the periods of time, and at the prices specified in the contracts.

While these parties were continuing to deal together under the contracts, the company became financially embarrassed, and under proceedings taken in the High Court John Craig was appointed receiver and manager, and subsequently George Edwards was appointed joint receiver and manager with Craig. Under the direction of the Court these joint receivers continued to carry on the business of the company and to deal with the defendants Parsons, under the contracts entered into by the company and other contracts entered into by Craig while acting as sole receiver and manager.

At various times the joint receivers and managers, under the authority of the Court, assigned and hypothecated to the plaintiffs the indebtedness of the defendants Parsons in respect of goods shipped and supplied to them. Subsequently, by order of the Court, Clarkson was appointed receiver and manager of the company, in the place and stead of Craig and Edwards; and afterwards, by an instrument of assignment, these three persons assigned and transferred to the plaintiffs whatever right, title, and interest they had or might have in the indebtedness of the defendants Parsons; and the defendants were, it is alleged, notified of the assignment.

Thereafter the plaintiffs brought this action against the defendants Parsons to enforce payment of the indebtedness so assigned to the plaintiffs, claiming payment of \$15,028, with interest.



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The defendants set up in defence that the indebtedness arose out of the contracts, and in no case amounted to more than \$12,113.68, and that they received no notice of the assignment.

They also set up a counterclaim, adding as defendants thereto Craig and Edwards, and therein alleged that these persons, while still receivers and managers, and while the contracts were existing in full force, had wrongfully notified the defendants Parsons that they would not continue to supply them with paper according to the terms of the contracts, and in breach thereof terminated them and ceased to supply paper, in consequence whereof the defendants Parsons were obliged to and did enter into contracts with others for the supply of paper to them at a greatly increased price, thereby occasioning great loss and damage in excess of the amount claimed by the plaintiffs. These damages they claimed to set off against the plaintiffs' claim to the extent thereof, and as to the remainder of these damages, in excess of the plaintiffs' claim, they claimed it as against Craig and Edwards.

The defendants Craig and Edwards moved before the Master in Chambers to set aside the counterclaim, and the application was refused.

Upon appeal to a Judge in Chambers, Meredith, C.J., decided that the counterclaim ought not to be allowed to stand as a counterclaim, but should stand as a defence to the plaintiffs' action to the extent necessary to enable the damages (if any) to be set off against the plaintiffs' claim; and he directed the counterclaim to be struck out as against Craig and Edwards.

The defendants Parsons thereupon appealed to a Divisional Court, which affirmed the order, and from this decision the present appeal was brought.

In pronouncing the order he made, Meredith, C.J., proceeded upon his view of our Rules and practice as contrasted with the Rules and practice under the English Judicature Act.

But the Divisional Court, while not expressing any opinion at variance with the learned Chief Justice's, placed the affirmance of his order upon a consideration of the nature of Craig and Edwards's liability (if any) to the defendants Parsons in respect of their dealings while the former were receivers and managers.

Objection was taken that no appeal lay to this Court, the matter being one of practice not affecting the ultimate rights

of the parties. This seems to be the correct view, but, assuming that the appeal is properly before us, the learned Chief Justice appears to have made a very proper disposition of the matter. The proceeding being interlocutory in its nature, he refrained from deciding whether there was any right of set-off in respect of unliquidated damages. That is a matter to be determined when the case comes to trial and damages are shewn. The whole question as to the meaning and application of Rule 251 will then properly come up in a way which will permit of an appeal to the highest tribunal.

For the same reasons the order of the Divisional Court, and not the reasons advanced for it, is all that need be reviewed at present, and as it, as issued, is but a simple dismissal of the appeal, this appeal must also be dismissed.

MEREDITH, J.A.:—This appeal has been argued at great length, not only upon the question of practice involved in it, but upon the merits of the whole case, notwithstanding the fact that there is plainly no right of appeal in any respect; the order in question in no respect affecting the ultimate rights of the parties, but only the mode of procedure to enforce them.

The single question involved is whether the defendants should be allowed to counterclaim in the action to any greater extent than enough to answer the plaintiffs' claim against them; it is purely a question of procedure; substantial rights are not and cannot be precluded by it. It is true that the reasons given by the Divisional Court for dismissing the appeal from the order made at Chambers, limiting the extent of the counterclaim, deal with the question of the nature and validity of the claims against the parties added by the counterclaim. But its order, not the reasons given for it, prevail; the parties are estopped only in so far as the order which it affirmed estops them. Conclusions may be right, though based upon erroneous reasons. The Divisional Court did nothing, and meant to do nothing, but dismiss the appeal to them, whatever it may have said, and whether that was right or wrong: they did not intend to prevent litigation by the usual methods between the parties upon the substantial questions in dispute between them.

The order in question, whether it does, or does not, lead to

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the most convenient way of dealing with the substantial questions intended to be raised by the counterclaim against Craig and Edwards, in no manner affects such substantial rights; such questions may be litigated in another action, or in any other manner in which it is competent in the parties to litigate them; and no substantial wrong or injustice is done in leaving them to be so litigated.

Mr. Boland's argument covered the whole ground without a superfluous word, a thing as helpful as it is refreshing in these days of interminable words.

I would dismiss the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

G. G.

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## APPENDIX.

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Cases reported in the Ontario Law Reports decided on appeal to the Supreme Court of Canada, reported since the publication of volume 17 Ontario Law Reports:—

FOSTER v. ANDERSON, 16 O.L.R. 565, affirmed: 42 S.C.R. 251.

McCLELLAN v. POWASSAN LUMBER Co., 17 O.L.R. 32, affirmed: 42 S.C.R. 249.

MORITZ v. CANADA WOOD SPECIALTY Co., 17 O.L.R. 53, affirmed: 42 S.C.R. 237.

PENSE v. NORTHERN LIFE ASSURANCE Co., 15 O.L.R. 131, affirmed: 42 S.C.R. 246.

STUART v. BANK OF MONTREAL, 17 O.L.R. 436, reversed: 41 S.C.R. 516.

THOMPSON v. EQUITY FIRE INSURANCE Co., THOMPSON v. STANDARD MUTUAL FIRE INSURANCE Co., 17 O.L.R. 214, reversed: 41 S.C.R. 491.

VIVIAN (H. H.) Co. v. CLERGUE, 16 O.L.R. 372, affirmed: 41 S.C.R. 607.





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## ACCIDENT INSURANCE.

1. *Construction of Policy—Contract for One Year—Continuation or Renewal—Period of Grace—Ontario Insurance Act, sec. 148 (1)—Authority of Agent.*]—Section 148 (1) of the Insurance Act, R.S.O. 1897, ch. 203, is not applicable to a contract of insurance which the assured has no right to continue or renew without the consent of the insurers; it merely makes uniform and extends the commonly contracted-for grace given to the assured to renew, after forfeiture or default, a contract renewable, or not, at his will.

In this case a policy of accident insurance was considered, having regard to its provisions, to be a contract for one year only, and one which could be continued or renewed only by mutual consent; and it was *held*, that there was no such continuation or renewal, although the agent of the insurers had, after the expiry of the year, and after an accident had happened to the assured, from the effects of which he died two weeks later, accepted from the assured a promissory note for the renewal premium and delivered to him or the beneficiary a renewal receipt which had been intrusted to the agent by the insurers, but not for such purpose. *Carpenter v. Canadian Railway Accident Insurance Co.*, 388.

2. *Commercial Traveller — Brakesman — Temporary Engagement in a more Hazardous*

*Employment — Condition — Amount Payable.*]—A policy of accident insurance described the insured as a commercial traveller, and contained a condition that if he met with an accident while “temporarily or permanently engaged in any occupation . . . classed by the company as more hazardous than that in which he is insured,” the amount payable should be what the premiums paid by him would entitle him to be insured for under such more dangerous classification. The insured applied for employment as a railway brakesman, and while taking the usual trial trip prior to engagement (in which, however, he worked gratuitously as a brakesman), he was killed, apparently by being run over by a train:—

*Held*, that the case fell within the above condition, and the amount payable was limited accordingly.

*McNevin v. Canadian Railway Accident Insurance Co.* (1900-2), 32 O.R. 284, 2 O.L.R. 531, 32 S.C.R. 194, considered and distinguished.

Judgment of Clute, J., reversed. *Stanford v. Imperial Guarantee and Accident Insurance Co. of Canada*, 562.

## ACCOUNTS.

*Neglect to Pass Yearly when so Directed by an Order Appointing Committee in a Lunacy Matter.*]—See LUNATIC.

## ACTION.

*By Adoptive Parent for Death of an Adopted Son by Negligence, not Maintainable.]—See NEGLIGENCE.*

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## AMENDMENT.

*By Adding Infant Children in Action Brought by the Mother alone for the Death of the Husband and Father.]—See MASTER AND SERVANT.*

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## APPEAL.

*Power of Court of Appeal to Grant Leave to Appeal to the Supreme Court of Canada and Extend the Time for Appealing.]—See SUPREME COURT OF CANADA, 1, 2.*

*General Rule, that Litigation should Cease with the Judgment of the Court of Appeal where Amount Involved does not Exceed \$1,000.]—See SUPREME COURT OF CANADA, 1.*

*Lies from Master's Report in a Mechanics' Lien Action.]—See MECHANICS' LIENS.*

*From a County Court to a Divisional Court from an Order that Plaintiffs be at Liberty to Sign Final Judgment in Default of Defendants Paying Money into Court.]—See COUNTY COURT APPEAL.*

*From a Decision of the Ontario Railway and Municipal Board on an Appeal from a Court of Revision lies only on Question of Law.]—See ASSESSMENT AND TAXES, 2.*

## ARBITRATION AND AWARD.

*Value of Buildings on Leasehold Property—Evidence of Rentals and Expenditure—Admissibility of Evidence—Stating Special Case—Question of Law—Arbitration Act, R.S.O. 1897, ch. 62, sec. 41.]—Evidence of rentals and other income received from buildings erected on leasehold property, and of all outgoings or expenditure in respect thereof during the term, is admissible on an inquiry before an arbitrator for the purpose of determining the value of the same, although, owing to exceptional circumstances, the revenue derived by the lessees may not in fact afford assistance.*

*A question as to the admissibility of evidence is one of law within the meaning of sec. 41 of the Arbitration Act. Rogers v. London and Canadian Loan and Agency Co., 8.*

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## ASSESSMENT AND TAXES.

*1. Tax Sale—Onus—Proof of Validity of Assessment and Subsequent Proceedings—Easement—Extinction by Tax Sale—"Privilege."]*—The onus of proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited.

*Jones v. Bank of Upper Canada (1867), 13 Gr. 74, and Stevenson v. Traynor (1886), 12 O.R. 804, followed.*

*The defendant contended that*

an easement or right of way enjoyed by the plaintiff over ten feet of land sold for taxes was extinguished by the sale in 1893, as being included in the word "privilege" used in the Consolidated Assessment Act, 1892, sec. 137, then in force:—

*Semble*, that the law of Ontario does not provide for the taxation of easements; and the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by the payment of taxes. *Essery v. Bell*, 76.

2. *Assessment Act*, sec. 10(1) (e) — *Departmental Store* — *Question of Fact*—*Decision of Ontario Railway and Municipal Board* — *Appeal* — 6 *Edw. VII.* ch. 31, sec. 51(3).]—By sub-sec. 3 of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 *Edw. VII.* ch. 31, an appeal from the decision of the Board on an appeal thereto from a court of revision, lies only upon a question of law.

Whether or not a firm carried on the business of what was known as a departmental store or that of a retail merchant dealing in more than five branches of retail trade or business in the same premises or separate departments of premises under one roof or in connected premises, so as to be liable to the assessment imposed by sec. 10(1) (e) of the Assessment Act, 4 *Edw. VII.* ch. 23(O.), is a question of fact and not of law; *MEREDITH, J.A.*, dissenting.

Leave, therefore, to appeal in such a case from the decision of the Board was refused.

*Per MEREDITH, J.A.*:—The

real question was the interpretation of the section in question upon the facts submitted, and this must be deemed to be a question of law. *Re S. H. Knox & Co. Assessment*, 645.

## ASSIGNEE.

*Of Policy Holders, Rights of, on Winding up Insurance Company.*]—See *LIFE INSURANCE*, 2.

## ATTORNEY-GENERAL.

*Attending on Trial Does not Enlarge Jurisdiction.*] — See *MINES AND MINERALS*, 3.

*Entitled of Absolute Right to a Certiorari.*] — See *CRIMINAL LAW*, 9.

## BANKRUPTCY AND INSOLVENCY.

*Assignment for Benefit of Creditors*—*Separate Liability of Partner*—*Right of Creditor of Partnership to Rank on Estate of Partner with Individual Creditors*—*R.S.O. 1897, ch. 147, sec. 7—Election.*]—A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm by the plaintiff:—

*Held*, that the plaintiff was entitled to rank upon the insolvent estate of the partner for the amount of the unpaid note, ratably with the individual creditors of the partner.

Construction of sec. 7 of the Assignments Act, *R.S.O. 1897, ch. 147.*

*Decision of MACMAHON, J.*, in



*Frost and Wood Co. v. Stoddart* (1908), 12 O.W.R. 1133, observed upon.

The plaintiff having elected, before accepting a dividend from the insolvent estate of the partnership, to pursue his remedy against the estate of the partner, the question whether, under the statute, it was necessary to elect, did not arise.

Judgment of MULLOCK, C.J. Ex.D., reversed. *Gordon v. Matthews*, 340.

### BANKS AND BANKING.

*Subscription for Shares — Subscription Conditional on Bank Opening Branch—Parol Evidence—Payment for Shares—Bank Act, R.S.C. 1906, ch. 29, secs. 37, 38.*]—The defendant, subscribed in writing for shares of a bank "on the strength of the bank agreeing to open a branch at S.," and the bank did so, but closed it five months afterwards:—

*Held*, that the defendant was bound to pay for the shares; and parol evidence that the agent who obtained his subscription promised that a branch would not only be opened, but maintained at S., was inadmissible.

*Held*, also, that, notwithstanding secs. 37 and 38 of the Bank Act, R.S.C. 1906, ch. 29, directors of a bank may agree with a shareholder as how his shares shall be paid for—at all events when the times for payment are to be such as they might fix under sec. 38 if there were no agreement. *Farmers Bank v. Blow*, 530.

### BENEFICIARIES.

*Rights of, on Winding up Insurance Company.*]—See LIFE INSURANCE, 2.

### BY-LAW.

*For Opening a Road Quashed as no Compensation was Awarded to the Owners for the Land Taken.*]—See MUNICIPAL CORPORATIONS, 2.

*For Expenditure Necessary for Public School House may be Rejected by the Municipal Council or Electors, but Architect Employed by the School Trustees to Prepare Plans for the Proposed Building Entitled to his Fees on a Quantum Meruit.*]—See PUBLIC SCHOOL TRUSTEES.

*Providing for a Board of five Directors to Manage a Company, but a Board of three Directors Undertaking to Act, Effect of.*]—See COMPANY, 5.

### CASES.

*Baker v. Trusts and Guarantee Co.* (1898), 29 O.R. 456, distinguished.]—See VENDOR AND PURCHASER.

*Bank of Minnesota v. Page* (1887), 14 A.R. 347, followed.]—See COUNTY COURT APPEAL.

*Blackley v. Elite Costume Co.* (1905), 9 O.L.R. 382, followed.]—See WRIT OF SUMMONS.

*Bloomenthal v. Ford.* [1897] A.C. 156, followed.]—See COMPANY, 4.

*Brown v. Waterous Engine Works Co.* (1904), 8 O.L.R. 37, distinguished.]—See MASTER AND SERVANT.

*Canadian Northern R.W. Co. and Robinson, Re* (1908), 17 Man. L.R. 396.]—See RAILWAY, 10.

*Cavanagh and Canada Atlantic R.W. Co., Re* (1907), 14 O.L.R. 523, dissented from.]—See RAILWAY, 10.

*Cheesborough, Re* (1897), 30 O.R. 639, followed.]—See LIFE INSURANCE, 4.

*Cox v. Adams* (1904), 35 S.C.R. 393, distinguished.]—See HUSBAND AND WIFE, 2.

*Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, referred to.]—See RAILWAY, 9.

*Erb v. Great Western R.W. Co.* (1877-1881), 42 U.C.R. 90, 3 A.R. 446, 5 S.C.R. 179, followed.]—See PRINCIPAL AND AGENT.

*Falle and Township of Tilsonburg, In re* (1873), 23 C.P. 167, followed.]—See WAY.

*Frost and Wood Co. v. Stoddart* (1908), 12 O.W.R. 1133, observed upon.]—See BANKRUPTCY AND INSOLVENCY.

*Glengarry Case* (1888), 14 S.C.R. 453, applied and followed.]—See PARLIAMENTARY ELECTIONS.

*Grant, Re* (1895), 26 O.R. 120, followed.]—See LIFE INSURANCE, 5.

*Grimsby Park Co. v. Irving* (1908), 41 S.C.R. 35, referred to.]—See SUPREME COURT OF CANADA, 2.

*Harkness, Re* (1904), 8 O.L.R. 720, followed.]—See LIFE INSURANCE, 4.

*Harris Campbell and Boyden Furniture Co. of Ottawa, Re* (1905), 5 O.W.R. 649, considered and explained.]—See COMPANY, 3.

*Hess Manufacturing Co., Re* (1904), 23 S.C.R. 644, considered and explained.]—See COMPANY, 3.

*Hewison v. Township of Pembroke* (1884), 6 O.R. 170, commented on.]—See WAY.

*Hobson v. Gorringe*, [1897] 1 Ch. 182, applied and followed.]—See FIXTURES.

*Hopkins Estate, Re* (1900), 32 O.R. 315, approved.]—See WILL, 2.

*Jacobs v. Booths Distillery Co.* (1901), 5 O.W.R. 49, 85 L.T.R. 264, followed.]—See COUNTY COURT APPEAL.

*Jones v. Bank of Upper Canada* (1867), 13 Gr. 74, followed.]—See ASSESSMENT AND TAXES, 1.

*Keir v. Leeman* (1844), 6 Q.B. 308, (1846), 9 Q.B. 371, specially considered.]—See CONTRACT, 1.

*Lea and Ontario and Quebec R.W. Co., Re* (1885), 21 C.L.J. 154, referred to and discussed.]—See RAILWAY, 10.

*Lewis v. Old, Re* (1889), 17 O.R. 610, not followed.]—See DIVISION COURTS, 1.

*Locker v. Reid* (1842), 6 O.S. 295, not followed.]—See PROMISSORY NOTE.

*McLean and Township of Ops, Re* (1880), 45 U.C.R. 325, discussed.]—See MUNICIPAL CORPORATIONS, 1.

*McNevin v. Canadian Railway Accident Insurance Co.* (1900-2), 32 O.R. 284, 2 O.L.R. 531, 32 S.C.R. 194, considered and distinguished.]—See ACCIDENT INSURANCE, 2.

*Moody Estate, In re* (1906), 12 O.L.R. 10, approved.]—See WILL, 2.

*Morris, Rural Municipality of, v. London and Canadian L. and A. Co.* (1891), 19 S.C.R. 434, distinguished.]—See COUNTY COURT APPEAL.

*New Brunswick R.W. Co. v. Armstrong* (1883), 23 N.B.R. 193, approved and followed.]—See RAILWAY, 9.

*North Bruce Case, Re* (1891), 27 C.L.J. 538, distinguished.]—See PARLIAMENTARY ELECTIONS.

*Perrin Plow Co., Re* (1908), 12 O.W.R. 387, distinguished.]—See COMPANY, 4.

*Philbrick and Ontario and Quebec R.W. Co., Re* (1886), 11 P.R. 373, referred to and distinguished.]—See RAILWAY, 10.

*Provincial Grocers Limited, Re (Calderwood's Case)* (1905), 10 O.L.R. 705, distinguished.]—See COMPANY, 2.

*Railway Time Tables Publishing Co., In re, Ex p. Sandys* (1889), 42 Ch. D. 98, followed.]—See COMPANY, 6.

*Regina v. Biggins* (1862), 5 L.T.N.S. 605, followed.]—See CRIMINAL LAW, 3.

*Regina v. McGregor* (1895), 26 O.R. 114, distinguished.]—See INTOXICATING LIQUORS, 1.

*Reynolds v. Ashby & Son Limited*, [1903] 1 K.B. 87, [1904] A.C. 466, applied and followed.]—See FIXTURES.

*Rex v. Cook* (1908), 18 O.L.R. 415, followed.]—See INTOXICATING LIQUORS, 3.

*Rex v. Leconte* (1906), 11 O.L.R. 408, followed.]—See CRIMINAL LAW, 3.

*Stevenson v. Traynor* (1886), 12 O.R. 804, followed.]—See ASSESSMENT AND TAXES, 1.

*Tatham, Re* (1901), 2 O.L.R. 343, approved.]—See WILL, 2.

*Taylor and Ontario and Quebec R.W. Co., Re* (1886), 11 P.R. 371, referred to and distinguished.]—See RAILWAY, 10.

*Tuckett, Re* (1907), 9 O.W.R. 979, overruled.]—See WILL, 3.

*Westropp v. Elligott* (1884), 9 App. Cas. 815, discussed and followed.]—See LANDLORD AND TENANT, 3.

## CERTIORARI.

*Right to, Taken away in Certain Cases.*]—See CRIMINAL LAW, 6—INTOXICATING LIQUORS, 3.

*Right to, Absolute, of Attorney-General.*]—See CRIMINAL LAW, 9.

## COMMITTEE.

*Of Lunatic, Allowance to.*]—See LUNATIC.

## COMPENSATION.

*Under Mines Acts of 1906 and 1907.*]—See MINES AND MINERALS, 1.

*To Lessees, for Expropriation after Expiration of Leasehold Term as "Persons Interested" in the Land.*]—See RAILWAY, 3.

*For Road Allowance.*]—See MUNICIPAL CORPORATIONS, 2.

*To be Allowed, by Arbitrators for Lands Taken by a Railway Company, Limited to Determining the Amount.*]—See RAILWAY, 10.

## COMPANY.

1. "Prospectus"—*Advertisement—Ontario Companies Act,*



*secs. 95, 99, 100 — Director — Penalty.*—A mining company incorporated on the 17th November, 1908, pursuant to the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34, filed a prospectus with the Provincial Secretary on the 27th November, 1908, and subsequently inserted in certain newspapers an advertisement, for which the defendant, one of the directors, was responsible, giving particulars about the organisation of the company, the mining lands owned by the company, and the operations of the company, and stating that shares were for sale at a named price, but not complying in all respects with the requirements of the Act as regards a prospectus, and not filed with the Provincial Secretary:—

*Held*, that the advertisement was a "prospectus" within the meaning of sec. 99 of the Act, being an advertisement designed to accomplish the purpose mentioned in sec. 95(1), and that the defendant was liable to the penalty imposed by sec. 100.

*Seemle*, that an advertisement merely stating that a company are offering shares for sale, and that a prospectus can be obtained upon application, would be a "prospectus" within the meaning of the Act. *Re Rex v. Garvin*, 49.

2. *Petition for Incorporation — Memorandum of Agreement — Subscription to Previous Memorandum — Withdrawal of Subscription — Attending Shareholders' Meeting.*—A company was incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, on April 4th, 1907. One R. did not sign the

memorandum accompanying the petition, as prescribed by sec. 10, sub-sec. 2, of that Act, but he had signed a memorandum in the same form subscribing for \$500 of stock in the proposed company, and alleged that this subscription was not meant to bind him unless the company attempted to buy out a certain rival business, and, this not being done, he notified the company before it was organised that he would not take the shares.

In 1907 the company drew on him for calls, but he refused to accept the drafts. In January, 1908, for the first time, the company allotted stock to R., and he attended a meeting of the shareholders on April 6th, 1908, but only to protest against his being considered to be one. No stock certificate was issued to him:—

*Held*, that since the memorandum which R. signed was not the memorandum which accompanied the petition for incorporation, he did not become a shareholder by virtue of the statute, and he was not liable as a contributory on the winding-up of the company.

*Re Provincial Grocers Limited (Calderwood's Case)* (1905), 10 O.L.R. 705, distinguished. *In re Nipissing Planing Mills Ltd., Rankin's Case*, 80.

3. *Winding-up—Reference to Officer of Supreme Court—Settling List of Contributories—Certificates Declaring Stock Paid up in Full—Right of Officer to Inquire Whether Payments Made.*—Where, under an order of a High Court Judge, a reference has been directed to an officer of the Supreme Court of Judicature to take all neces-



sary proceedings for the due winding-up of a company, and delegating to him for such purpose the powers conferred on the Court therefor by the Winding-up Act, such officer has jurisdiction, in settling the list of contributories, to inquire into and decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon.

*Re Harris Campbell and Boyden Furniture Co. of Ottawa* (1905), 5 O.W.R. 649, and *Re Hess Manufacturing Co.* (1904), 23 S.C.R. 644, considered and explained. *Re Cornwall Furniture Co.*, 101.

4. *Contributory — Holder of Certificate of Shares as Security Only.*] — The appellant, who agreed to take one share in a company, received and accepted a certificate of five shares expressed to be fully paid up, four of which the managing director of the company informed him were intended only as security for certain paper to which he had become a party for the accommodation of the company. No stock was subscribed for by or allotted to him, but a dividend on the one share was paid to him:—

*Held*, that he was a contributory in respect to the one share only.

*Bloomenthal v. Ford*, [1897] A. C. 156, followed. *Re Perrin Plow Co.* (1908), 12 O.W.R. 387, distinguished. *In re Charles H. Davies Limited*, *McNicol's Case*, 240.

5. *Shares — Application — Allotment — Directors — Delegation of Authority — With-*

*drawal of Application—By-laws —Number of Directors.*]—At a general meeting of the shareholders of the plaintiff company, incorporated under the Ontario Companies Act, it was resolved that a board of three directors should be elected to manage the affairs of the company, and three of the five provisional directors were elected as directors. The three directors met and adopted by-laws, one of which provided that the affairs of the company should be managed by a board of five directors, and another provided for the terms upon which stock subscriptions should be received. About ten months later, a document in the form of an agreement to purchase stock was signed by the plaintiff, and the words "accepted by" written at the foot over the signature of one of the three directors, who had been elected president and general manager; and at a meeting of the directors a resolution was passed giving to the president full power to deal with the defendant's "application." On the following day the president wrote to the defendant notifying him that calls had been made upon the shares subscribed for by him, "which have this day been allotted to you by by-law of this company." Nothing further was done in the way of allotting shares to the defendant, and his name did not appear in the register of shareholders. About two weeks after the receipt of the president's letter, the defendant wrote to the company withdrawing and cancelling his application:—

*Held*, in an action for the amount of calls alleged to be

due, that the directors had no power to delegate to the president their authority as to the allotment of shares or their authority to accept the offer of the defendant; there was, therefore, no valid allotment, and the withdrawal was effectual.

*Seemle*, that the fact that the by-laws passed by the directors provided for a board of five directors, while a board of only three assumed to manage the affairs of the company, would be a bar to the plaintiffs' success in the action. *Twin City Oil Co. v. Christie*, 324.

6. *Winding-up — Contributory — Shares — Application on Condition that no Further Call be Made—Acceptance — Allotment — Right to Repudiate — Conduct Approbating Contract — Estoppel — Director — Misfeasance—Loss to Company.*]—A company organised under the Ontario Companies Act cannot issue shares at a discount, and *primâ facie* in a winding-up proceeding the holders of shares are liable for the full amount unpaid thereon, notwithstanding that they may have been issued as paid up, if in fact they were not paid up.

D. applied to a company so organised for 130 shares "upon which there has been paid ten per cent. of the par value thereof," and agreed to pay therefor \$1,300 "on the condition that no further call be made thereon." At a meeting of the directors of the company a resolution was passed accepting the application "and that the shares be and the same are hereby allotted and issued to him," etc. In the minutes of the meeting, following the entry of the reso-

lution, it was stated that the shares were allotted and issued on the condition that no further call would be made thereon. H., a director and president of the company, notified D. of the acceptance of his application; and a few days later D. sent his cheque to the company for \$1,300, and gave a shareholder a proxy to vote on the shares so allotted, which proxy was exercised at a shareholders' meeting. A dispute arose at the meeting in regard to D.'s shares, and, learning of it from H., D. decided to have nothing further to do with the company, and stopped payment of his cheque, H. concurring in this and instructing the company's secretary not to present the cheque for payment. There was no minute of any subsequent meeting of the directors; nothing further was done by D. in the way of repudiation; and three months later an order was made for the winding-up of the company. D.'s name was entered on the company's register as the owner of 130 shares, and a certificate that he was such owner, but not stating that the shares were fully paid, or were not subject to call, was signed by the president and secretary, but not delivered to D. :—

*Held*, that D. might have successfully repudiated the contract the moment he heard of the allotment, because the condition attached to the application was not within the power of the directors to comply with; yet, not having done so, but having given a cheque for the purchase price, and (by proxy) voted on the shares, his conduct was only consistent with an intention to be treated and to

treat himself as a shareholder, and he was estopped from disputing his liability, and should be placed on the list of contributories in the winding-up.

*In re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98, followed.

*Held*, also, that but for H.'s intervention the cheque would have been paid, and he was guilty of a breach of his duty as a director which amounted to misfeasance within the meaning of sec. 123 of the Dominion Winding-up Act; and he was ordered to pay \$1,300 to the liquidator. *Re Lake Ontario Navigation Co., Davis's Case, Hutchinson's Case*, 354.

7. *Directors Allotting themselves Shares as Fully Paid up — Misfeasance — Winding-up Act, R.S.C. 1906, ch. 144, sec. 123.*—An original subscriber and provisional director of a company who had only paid \$25 on account joined with the other provisional directors in passing a resolution, at the organisation meeting of the company in 1902, that the shares of capital stock subscribed for by them should be allotted to them as fully paid up, which was done. In 1904 he transferred his shares, receiving therefor the sum of \$125 more than he had paid. In 1906 the shares were forfeited, by resolution of the directors, for non-payment of a call of 100 per cent. made upon them:—

*Held*, in winding-up proceedings (MEREDITH, J.A., dissenting as to the measure of damages), that the original subscriber for the shares was liable as for breach of trust under sec. 123 of the Winding-up Act, R.S.C. 1906, ch. 144, in assuming to accept the shares as fully

paid up; but the measure of damages was the market value of the shares at the date of the allotment, and the sum of \$125 was all that he was liable for in this proceeding.

*Per* MEREDITH, J.A.:—The measure of damages was the par value of the shares.

Judgment of TEETZEL, J., affirmed. *In re Manes Tailoring Co., Crawford's Case*, 572.

*Winding-up of Insurance Company.*—See LIFE INSURANCE, 2.

## CONSTITUTIONAL LAW.

See MINES AND MINERALS, 3.

## CONTRACT.

1. *Indemnity — Consideration therefor — "False Pretences"*—*Withdrawal of Criminal Charge—Validity—Action on.*—A charge laid before a magistrate against a person for procuring from the plaintiff, by false pretences, the sum of \$10, was, by direction of the magistrate, withdrawn, in consideration of an agreement entered into between the plaintiff and the defendants, whereby the plaintiff was to withdraw from a certain syndicate and forfeit the \$10 paid, the defendants indemnifying him against all liabilities of the syndicate. Judgment having been recovered against the plaintiff for a liability of the syndicate, he brought an action against the defendants for indemnity:—

*Held*, that the agreement for the withdrawal of the criminal charge was void and could not be enforced, and that the plaintiff's action was not maintainable.



*Keir v. Leeman* (1844), 6 Q.B. 308, (1846), 9 Q.B. 371, specially considered. *Morgan v. McFee*, 30.

2. *Carrier — Carriage by Water — Bill of Lading — Weights and Measures—Bushel—Canadian Standard or American Standard—Applicability of — Compulsory Payment — Freight—Action for Excess—Contract by Telegram.*]—An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, “at the rate of 2½ cents per bushel.” and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lading signed by him at the port, which stated “rate of freight as per agreement:”—

*Held* (MAGEE, J., dissenting), that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract.

Where, on delivery by vessel of cargo, freight in excess of the amount due was paid as demanded, without protest:—

*Held*, that nevertheless such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of non-delivery to purchasers, would have been incurred; and the excess paid was recoverable by action.

A contract by telegram is made at the place where the telegram of acceptance is sent from. *Melady v. Jenkins Steamship Co.*, 251.

3. *Interest in Mining Claim—Statute of Frauds—Mining Act of Ontario, 1908, sec. 71—Application to Rights Arising before Enactment.*]—Section 71 of the Mining Act of Ontario, 1908, provides that no person shall be entitled to enforce any claim, right, or interest, contracted for or acquired before the staking out, to or in any mining claim staked out or recorded in the name of another person, unless the fact that the former is so entitled is made to appear by a writing signed by the holder of the claim, etc., and that where a right or interest is so made to appear, the provisions of the Statute of Frauds shall not apply. The Act came into force on the 15th May, 1908, and this action, brought to enforce a claim or interest such as is mentioned in sec. 71, based upon a writing signed in 1906, was not commenced until February, 1909:—

*Held*, that sec. 71 applied to the action, and prevented the application of the Statute of Frauds. Section 4 of the Statute of Frauds (sec. 5 of R.S.O. 1897, ch. 338) does not invalidate the contract, but merely prohibits the bringing of an action in certain cases. *Chevrier v. Trusts and Guarantee Co.*, 547.

*Validity of, where a Provision Inserted Similar to one already Approved of by the Railway Board in another Contract.*]—See RAILWAY, 4.

*For Purchase of an interest in Lands, Offered for Sale by the Court in a Mechanics' Lien Action Subject to a Tax Imposed by the Supplementary*



*Revenue Act, 1907, though not Known to either the Vendors or Purchaser, Right to Rescission.]—See MECHANICS' LIENS.*

### CONVERSION.

*Of Goods by Railway Company, Liability for Damages.]—See RAILWAY, 5.*

### CONVICTION.

*Justice of the Peace—Indictable Offence—Criminal Code, secs. 521, 583, 602, 778(3)—Information, Immateriality of—Charge Formulated and Read over to Accused—Trial and Conviction thereunder.]—An information laid under sec. 521 of the Criminal Code charged that the accused on, etc., did unlawfully and wilfully commit damage by breaking four insulators on telegraph poles, the property of the Canadian Pacific R.W. Co., contrary to the provisions of the said section, without stating, as required by the section, that the insulators formed part of and were used and employed in and about the electric telegraph line of the railway, or that the damage was done without legal excuse and without colour of right. The magistrate, however, did not try the accused on the information, but, on the accused electing to be tried summarily, and on the magistrate deciding to try the case, he, as required by sec. 778(3) in cases of indictable offences, formulated the charge in writing, containing all the requirements of sec. 521, which he read over to the accused, who pleaded guilty thereto, and on*

such charge, so formulated and pleaded to, the accused was tried and convicted:—

*Held*, that, the charge being for an indictable offence, it was not essential that the whole subject matter, including matters requiring to be negatived, should be set out in the information, its object being merely to inform the magistrate of the nature of the charge, the accused not being tried and convicted thereon, but on the charge as formulated and read over to him.

*Held*, also, that it was immaterial that the warrant of commitment followed the information, for that the keeper of the prisoner or any Court before which the matter might come up on *habeas corpus* would be sufficiently informed of the nature of the offence; but, if not, there being a valid and regular conviction, opportunity would be afforded of allowing a warrant in strict compliance with the conviction to be lodged with the keeper.

*Held*, also, that the punishment imposing nine months' imprisonment was not, under the circumstances, excessive. *Rex v. Gill*, 234.

*See CRIMINAL LAW—INTOXICATING LIQUORS—JUSTICE OF THE PEACE.*

### CORONER.

*Jurisdiction—Issue of Warrant to Arrest Witness Disobeying Summons—Ministerial Act—Certiorari—Prohibition—Place of Execution of Warrant—Re-examination of Witness.]—Certiorari will not lie to re-*

move a warrant issued by a coroner for the apprehension of a witness, upon default in obeying a summons to appear and testify, because the coroner in issuing the warrant is acting in a ministerial and not a judicial capacity: R.S.O. 1897, ch. 97, sec. 5.

A coroner is a local officer who can act only within his own municipal jurisdiction; and a warrant to apprehend issued by him cannot be validly executed out of his county.

The fact that a witness at an inquest has already been questioned at great length is not a ground for prohibiting the coroner from subjecting her to further examination; the Court assumes that the coroner will not permit the witness to be unduly harassed. *Re Anderson and Kinrade*, 362.

### COSTS.

*Of a Successful Appeal and Sale Proceedings Added to a Mechanics' Lien Holder's Claim.*] — See MECHANICS' LIENS.

*Disallowed by a Referee to a Committee for a Lunatic on Passing of Accounts, Interference with.*] — See LUNATIC.

### COUNTY COURT APPEAL.

*Right of Appeal—Summary Order for Judgment if Money not Paid into Court—Order “in its Nature Final” — County Courts Act, sec. 52—Valid Offences—Unconditional Leave to Defend.*] — An order made by the Judge of a county court,

upon an application by the plaintiffs for summary judgment under Rule 603, allowing the defendants to defend upon condition of their paying money into Court, and directing that, in default of payment into Court, the plaintiffs be at liberty to sign final judgment, is “in its nature final and not merely interlocutory,” within the meaning of sec. 52 of the County Courts Act; and an appeal therefore lies from such an order to a Divisional Court of the High Court.

*Bank of Minnesota v. Page* (1887), 14 A.R. 347, followed.

*Rural Municipality of Morris v. London and Canadian L. and A. Co.* (1891), 19 S.C.R. 434, following the English decisions, distinguished.

Where valid defences are sworn to by the defendants in answer to a motion for summary judgment, unconditional leave to defend should be granted.

*Jacobs v. Booth's Distillery Co.* (1901), 50 W.R. 49, 85 L.T.R. 262, followed.

Order of the Judge of the County Court of Carleton reversed. *F. J. Castle Co. Limited v. Kouri*, 462.

### CRIMINAL LAW.

1. *Railway Employees—Selling Liquor to—Offence Created by both Provincial and Dominion Acts—Information under Ontario Act—Non-applicability to Employees of Dominion Railway—Non-applicability of Ontario Act—Knowledge by Bar-keeper of the Employees Being such.*] — Where Acts have been passed by the Dominion Parliament and Provincial Legislature

prohibiting an act, and an information is laid charging as an offence the commission of the prohibited act "contrary to the statute in such case made and provided," such information must be held, in the absence of a specific reference to the particular statute, to have been laid under that statute in which words are used to describe the elements of the offence.

An information charged that the defendant at, etc., did sell, give, or barter spirituous or intoxicating liquors to a conductor and engineer on the Grand Trunk Railway, while actually employed in the course of their duty in connection with the operation of a train; and that such liquor was supplied by the defendant's barkeeper contrary to the form of the statute, following the wording of the Ontario Railway Act, 6 Edw. VII. ch. 30:—

*Held*, that the offence must be deemed to be one under the Ontario Act, and not under sec. 414 of the Dominion Railway Act; and as by sec. 3 of the Ontario Act such Act is restricted to railways within the jurisdiction of the Ontario Legislature, and the Grand Trunk Railway being under the jurisdiction of the Dominion Parliament, a conviction of the defendants for the alleged offence could not be supported.

*Semble*, the fact of the men not being in uniform, and not known to the barkeeper to be railway employees, would not exculpate the defendant. *Rex v. Treanor*, 194.

2. *House of Ill-fame—Frequent* — "*Habitual Frequent* — "*Conviction—Omission*

*of Averment of not Giving Satisfactory Account of himself.*]

—The prisoner was charged and convicted with being on a specified occasion "a frequenter of a house of ill-fame," it not being stated that he was in the "habit of frequenting," under secs. 238, 239, of the Code, or was an "habitual frequenter," under sec. 773 of the Code, and without anything appearing in the conviction to shew that he was asked to give, or failed to give, a satisfactory account of himself:—

*Held*, that no offence was shewn in the conviction; and the prisoner was discharged on *habeas corpus* proceedings. *Rex v. Lamothe*, 310.

3. *Conviction for Keeping a Disorderly House—Habeas Corpus—Statement of Offence—Counsel for Defendant—Refusal of Adjournment to Procure—Discretionary Power of Magistrate—Jurisdiction—Criminal Code, secs. 238(j), 715, 722.*—The defendant was convicted before two justices of the peace for being the keeper of "a disorderly house of prostitution or house for the resort of prostitutes," and was sentenced to six months' imprisonment in gaol. On application being made for her discharge upon a writ of *habeas corpus*, it appeared by her affidavit, which was not contradicted, that the magistrates had refused to adjourn the trial to enable her to procure counsel, but it did not appear that any injustice was caused by the refusal of the adjournment:—

*Held*, affirming the order of MEREDITH, C.J.C.P., that the conviction was not in the altern-



ative, specifying two offences, but properly set out one offence under sec. 238(j) of the Criminal Code.

*Rex v. Leconte* (1906), 11 O.L.R. 408, followed.

(2) The defendant, under sec. 715 of the Criminal Code, had the absolute right to the assistance of counsel if she could obtain it, but was not entitled as of right to an adjournment for the purpose of enabling her to do so. That was a matter within the discretion of the magistrates under sec. 722, and their refusal to adjourn did not affect their jurisdiction so as to enable the defendant to quash the conviction in a *habeas corpus* proceeding.

*Regina v. Biggins* (1862), 5 L.T.N.S. 605, followed. *Rex v. Irving*, 320.

4. *Money Lenders Act—Conviction for Lending Money at Usurious Rate — Scheme to Evade Act—Discount at Bank — Brokerage—Evidence.*]—The defendant, a money lender, was convicted by a magistrate of lending money at a rate of interest greater than that authorised by the Money Lenders Act, R.S.C. 1906, ch. 22. The evidence shewed that the defendant advanced \$185 to R. on two promissory notes, at one and two months, for \$100 each, the rate of interest thus being apparently 60 per cent. per annum. The defendant, however, explained the charge of \$15 by shewing that he discounted the notes with a chartered bank, for which the bank received \$1.50, and that the balance of \$13.50 was charged as "brokerage"—he being, as he said, not a principal, but a broker or agent.

The magistrate found that the accused was a principal, and that the transaction with the bank was merely a shift to avoid the penalties of the Act:—

*Held*, that there was evidence upon which the magistrate could properly so find; and the conviction was affirmed. *Rex v. Dubé*, 367.

5. *Conviction of Foreigner—Habeas Corpus — Return of Valid Conviction and Warrant of Commitment—Right to Review Evidence—Prisoner not Understanding Proceedings at Trial — Interpreter — Capacity — Question for Magistrate — Rights of Foreigner on Trial.*]—Upon a motion to discharge a prisoner, upon the return of a writ of *habeas corpus*, the proceedings should not be conducted as upon an appeal from the magistrate's finding; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he did. All questions as to admissibility of evidence, method of conducting examinations, etc., are in the power of the trial tribunal; and such questions cannot be raised upon a motion to discharge.

In this case the return was good upon its face, shewing a warrant of commitment which recited the conviction of the defendant for unlawfully committing an act of indecency in a public place; and there was ample evidence to support the conviction; but the defendant attempted to shew by affidavits that, not understanding English, he did not know that he was on trial, and did not understand the evidence given. This was contradicted by one who



was sworn as an interpreter at the trial, and by a policeman:—

*Held*, that the capacity of the interpreter and all matters connected with the interpretation of the evidence were questions for the magistrate, and his finding could not be attacked in this way.

*Seemle*, that there is no inherent right in any foreigner that the proceedings taken in the Courts of this province shall be made wholly intelligible to him, even though he should be charged with crime. Cases in which a contrary doctrine is laid down turn upon some statutory or constitutional provision. *Rex v. Mecekklette*, 408.

6. *Magistrate's Conviction—Motion to Quash—New Procedure*—8 Edw. VII. ch. 34—*Certiorari—Right Taken away—Ontario Summary Convictions Act*, sec. 7, sub-sec. 2—*Right of Appeal—Liquor License Act*, sec. 118—*Adequate Remedy—Jurisdiction of Magistrate.*]—The right to take the new procedure for the quashing of convictions, etc., substituted by 8 Edw. VII. ch. 34(O.) for *certiorari* and proceedings founded thereon, must be confined to cases in which, prior to that Act, the defendant would have been entitled to a writ of *certiorari*; and where the right to *certiorari* is taken away the new procedure is not applicable.

A motion made under the new procedure to quash a magistrate's conviction for an offence against the Ontario Liquor License Act was dismissed, except as to one ground, it being considered that the other objections to the conviction were not such as, if substantiated, would

oust the jurisdiction of the magistrate, and also that in respect of them the defendant would have an adequate remedy by the appeal given him by sec. 118 of the Liquor License Act; and, in these circumstances, the right to *certiorari*, and therefore the right to move under the new procedure, was taken away by sec. 7, sub-sec. 2, of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12, sec. 14, amended by 4 Edw. VII. ch. 10, sec. 23.

It cannot be said that, because defects in the proceedings before the magistrate may be cured by the appellate tribunal, therefore an appeal does not afford an adequate remedy. *Rex v. Cook*, 415.

7. *Comment of Judge on Failure of Accused to Testify—Canada Evidence Act*, R.S.C. 1906, ch. 145, sec. 4(5).]—A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify within the meaning of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4(5). *Rex v. Guerin*, 425.

8. *Conspiracy—Offence Committed in one County and Tried in another—Venue—Jurisdiction—Criminal Code*, R.S.C. 1906, ch. 146, secs. 577, 653.]—On an information laid in the county of York, the accused were charged with numerous offences against the election law alleged to have been committed in the "county of York, and in the county of Middlesex, and at the other places in the Province

unknown." None of them resided nor were found nor apprehended in the county of York, but they were brought into that county solely by process issued under the information. Before the sitting of the assize court in the county of York the accused surrendered to the sheriff of the county, and elected to be tried before the county court Judge.

The grand jury returned a true bill against them. The offence, however, found to be established, and on which they were convicted, was a conspiracy wholly entered into and wholly carried out in the county of Middlesex, with no overt acts outside that county:—

*Held*, on a case reserved, that there was no jurisdiction to try the case in the county of York; and that the conviction should be quashed notwithstanding sec. 577 of the Criminal Code. *Rex v. O'Gorman et al.*, 427.

9. *Warrant of Commitment—Failure to Recite Conviction—Habeas Corpus—Motion for Discharge—Application by Attorney-General for Certiorari—Right to, ex Debito Justitie—Adjournment of Motion—Practice—Invalid Warrant—Power to Amend—Discharge—Stay—Terms.*]—The defendant was imprisoned under a warrant of a police magistrate, directed to a constable and the keeper of the gaol, reciting that the defendant was charged before the magistrate for unlawfully selling, at a place and on a day named, intoxicating liquor, and reciting an information for a third offence against the Liquor License Act, and then, without any allegation of a conviction,

commanding the defendant's conveyance to the gaol and detention there at hard labour for six months. The defendant procured a writ of *habeas corpus*, declining a *certiorari* in aid. Upon a motion made for the discharge of the defendant, counsel for the Attorney-General appeared and asked for a *certiorari* to bring up the papers. This was granted, subject to all objections, and the motion for discharge adjourned till the return of the *certiorari*:—

*Held*, that the Attorney-General is entitled to a *certiorari* of absolute right and absolutely in all cases; and that the recent statute 8 Edw. VII. ch. 34(O.) and the corresponding Rules do not affect such right.

*Held*, also, that there was power to adjourn the motion, and that the proper practice was followed.

*Held*, however, that the warrant was bad, and could not be cured or amended under sec. 1123 of the Criminal Code, R.S.C. 1906, ch. 146, nor under sec. 105 of the Liquor License Act, R.S.O. 1897, ch. 245.

The defendant was entitled to be discharged, and the discharge should not be stayed for a new warrant, nor should terms be imposed.

Remarks on the necessity for attention by magistrates and others to the form of proceedings, especially in matters involving the liberty of the subject. *Rex v. Nelson*, 484.

10. *Evidence—Untrue Statement Made to Prisoner—Subsequent Voluntary Statement by Prisoner—Admissibility—Confession Obtained by Artifice.*]—

The prisoner W. was tried for attempting to murder J. P., whose wife, M. P., was tried at the same time for aiding and abetting in the attempt. Before the trial, and while W. was in custody, a police officer made an untrue statement to him, that M. P. had "done some talking" about the matter, upon which W. voluntarily made statements to the officer as to the key of J. P.'s house, and as to a club which he said he had used:—

*Held*, that evidence was properly admitted as to the statements made by W. with regard to the key and the club.

Subsequently to the making of the untrue statement by the police officer, conversations were overheard between W. and his father and between W. and M. P., in which the former admitted his guilt:—

*Held*, that evidence was properly admitted as to these conversations.

*Per OSLER, J.A.*:—Though the practice is not to be approved of, it is, generally speaking, no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made. *Rex v. White*, 640.

*Withdrawal of Criminal Charge, Agreement for, Void.*]  
—See CONTRACT, 1.

### DAMAGES.

*Negligence — Injury — Impairment of Prospects of Marriage — Remoteness — Excessive Damages.*]  
—In an action for negligence, impairment of the

prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.

In such a case of accident to a young woman of about 21 years of age, living with her father, but earning \$6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—

*Held*, that a verdict of \$5,500 damages was not so excessive as to necessitate a new trial. *Morin v. Ottawa Electric R.W. Co.*, 209.

*Excessive — New Assessment Directed.*]  
—See FATAL ACCIDENTS ACT.

*Measure of.*]  
—See RAILWAY, 5—COMPANY, 7.

### DEATH.

*Presumption of—Life Policy —Absence for over Seven Years —7 Edw. VII. ch. 36, sec. 3 (O.)*]  
—In order to establish the presumption of the death of the claimant's husband, on account of his not having been heard of for seven years, it was proved that in May, 1900, he had gone in a sail-boat to an island adjacent to where he lived to procure some lumber to be used in his business, and that while on this island a violent storm having arisen, he had telephoned his wife that he would probably be detained. He did not, however, return, and his wife had not heard of him since. The boat was subsequently



found with the sail set and having some lumber and his cap in it. On the following morning he was supposed to have been seen at the railway station, but the person who thought he saw him would not swear to his identity. It was said that a person who had lost some chairs suspected him of having stolen them, but it did not appear that he knew that he was suspected, while it appears that the detectives suspected someone else. In 1901 a letter was received from a favourite aunt in England, with whom he was in the habit of corresponding, asking about him, and stating that she had not heard from him for some time past. On the case coming before the Court of Appeal, the giving of judgment was stayed, at the claimant's request, to enable her to furnish an affidavit from the aunt verifying her letter:—

*Held*, affirming the judgment of the Divisional Court, reversing the judgment of Riddell, J., that there was sufficient evidence to raise the presumption of death, even without the affidavit subsequently furnished.

MEREDITH, J.A., dissented on the question of the need of the further evidence. *Re Ancient Order of United Workmen and Mary Ann Marshall*, 129.

## DEVOLUTION OF ESTATES ACT.

*Registration of Caution after Expiry of three Years—Approval of Official Guardian—Vested Interest of Infant in Land Devolving—Construction of secs. 14, 15, 16—Revesting in Per-*

*sonal Representative—Sale with Approval of Guardian.]—Sections 14 and 15 of the Devolution of Estates Act, R.S.O. 1897, ch. 127, as amended by 2 Edw. VII. ch. 17, apply where the interests of infants as well as those of adults are to be affected; and where, upon an intestacy, land has vested in an adult and an infant (the heirs of the intestate), after three years from the death of the intestate, the land not having been disposed of or conveyed by the administrator, and no caution having been registered, within that period, a caution may be registered, under sec. 14, after the expiry of that period, upon the certificate of the official guardian approving of and authorising the caution to be registered being given and registered with the caution; and the effect, under sec. 15, is to re-vest the land in the administrator, just as it would have been or remained vested if the caution had been registered within the three years; and the administrator, with the consent of the official guardian, acting on behalf of the infants, may then sell and convey as provided in sec. 16. *Re Bowerman and Hunter*, 122.*

## DIRECTORS.

*Powers of, to Agree how Shares are to be Paid for.]—See BANKS AND BANKING.*

## DISCRETION.

*Of Magistrates to Grant Adjournment to Enable Defendant*



to Obtain Counsel.]—See CRIMINAL LAW, 3.

*Of Magistrate as to Allowing Counsel to Ask Certain Questions on Cross-Examination.*]—See JUSTICE OF THE PEACE.

## DISTRIBUTION OF ESTATES.

*Ascertainment of Next of Kin—Legitimacy—Foreign Law—Conflict of Expert Testimony—Determination by Court.*]—On appeal by the defendants from the judgment of Anglin, J., reported 10 O.L.R. 147, upon the question as to the legitimacy of Parley Hunt jr., half-brother of George Washington Todd, in the report below mentioned, the Court of Appeal on December 30th, 1905, affirmed the judgment and dismissed the appeal. *Hunt v. Trusts and Guarantee Co.*, 351.

## DIVISION COURTS.

1. *Mandamus—Jury Trial—Nonsuit after Verdict—Powers of Judge*—62 Vict. ch. 11, sec. 9 (O.)]—In a Division Court suit tried with a jury, the Judge reserved judgment on a motion for nonsuit, subject to which he took the findings of the jury, and subsequently granted the nonsuit on the ground that there was no evidence to go to the jury. The plaintiff then applied for a mandamus, requiring the Judge to enter judgment for the plaintiff upon the findings of the jury:—

*Held*, affirming the order of Anglin, J., that under the provisions of 62 Vict. ch. 11, sec. 9 (O.), the Judge had jurisdiction to nonsuit the plaintiff, al-

though the jury had rendered their verdict.

*Re Lewis v. Old* (1889), 17 O.R. 610, not followed, having been decided before the passing of the statute above referred to. *Re Johnson and Kayler*, 248.

2. *Order for Committal of Judgment Debtor—Power to Rescind—Division Courts Act, sec. 247—Mandamus.*]—A Judge of a division court has no power, under any of the provisions of the Division Courts Act, or otherwise, to rescind an order made by him, under sec. 247 of the Act, committing a judgment debtor to gaol, on the ground that it appeared to the Judge that the debtor had incurred the debt for which judgment had been recovered, by means of fraud.

A mandamus to the Judge to hear an application to rescind was refused. *Re Wilson v. Durham*, 328.

## EQUITABLE EXECUTION.

See RECEIVER.

## EVIDENCE.

*Of Receipts From and Expenditure on Buildings Receivable on Arbitration to Determine the Value of the Buildings.*]—See ARBITRATION AND AWARD.

*To Establish Presumption of Death after Absence of over Seven Years.*]—See DEATH.

*Vivâ Voce in Open Court Necessary to have Marriage Declared Invalid.*]—See HUSBAND AND WIFE, 1.

*Nonsuit Granted by Judge after Verdict of Jury on the Ground that there was no Evidence to go to the Jury.*]—See DIVISION COURTS, 1.

*Of Want of Reasonable and Probable Cause after Criminal Proceedings Initiated.*] — See MALICIOUS PROSECUTION.

*Of Statements Made by a Prisoner in Custody Induced by an Untrue Statement Made by a Police Officer of Overheard Conversations Between the Prisoner and Others.*]—See CRIMINAL LAW, 10.

*Of Confession of a Prisoner Obtained by a Trick or Artifice.*]—See CRIMINAL LAW, 10.

#### FATAL ACCIDENTS ACT.

*Excessive Damages—Death of Wife and Mother—R.S.O. 1897, ch. 166.*]—In an action under the Fatal Accidents Act, R.S.O. 1897, ch. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded \$3,325, apportioning \$325 to the executors of her husband, who survived her, \$800 to a daughter 36 years of age, \$700 to a son 27 years of age, and \$1,500 to a son 21 years of age:—

*Held*, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment. *Ronson v. Canadian Pacific R.W. Co.*, 337.

#### FIXTURES.

*Machinery Leased to Company—Annexation to Freehold—Rights of Lessor against Mortgagee of Company's Lands.*]—Certain articles of machinery were leased by the plaintiff for one year to a manufacturing company, and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the plaintiff their lands, including these premises, with all the plant and machinery thereon, or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings in which they were placed, but all could be detached at a trifling cost, without doing substantial damage to the inheritance:—

*Held*, upon the evidence, that the articles were so annexed to the freehold as *primâ facie* to constitute them, as between the company and the defendant, fixtures; and, the defendant not being a party to the agreement between the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual hire-purchase agreement, afforded no evidence to alter the *primâ facie* character of the annexed property; and the plaintiff was not entitled to the articles as against the defendant.

*Hobson v. Gorrings*, [1897] 1 Ch. 182, and *Reynolds v. Ashby & Son Limited*, [1903] 1 K.B. 87, [1904] A.C. 466, applied and followed. *Seeley v. Caldwell*, 472.

**FOREIGNER.**

*No Inherent Right in, to have Court Proceedings made wholly Intelligible to him.*—See CRIMINAL LAW, 5.

**FRAUDULENT PREFERENCE.**

*Sale of Business by Husband and Wife—Knowledge of Wife of Husband's Intention to Prefer Certain Creditors—Repayment of Part of Purchase Money to Wife by Way of Preference—Validity.*—An insolvent trader sold out his business to his wife, who was one of his creditors, having means of her own, and who actually raised the money to make the purchase:—

*Held*, that the sale and transfer were valid, notwithstanding that the wife knew of her husband's insolvency and that he intended to prefer certain of his creditors to others by payments out of the purchase money.

The whole of the purchase money of the business was paid over to the husband on the understanding, however, that the wife would at once be repaid the amount owing to her, which was done:—

*Held*, that the transaction must be considered as an advance of the purchase money less the amount owing to her, and that as to that amount it was fraudulent and void, and she was a debtor to her husband's estate for the portion of the purchase money thus paid back to her, and must account for the same to her husband's assignee for creditors. *Langley v. Beardsley*, 67.

**GUARANTEE.**

*Of Note.*—See PROMISSORY NOTE.

**HABEAS CORPUS.**

See CRIMINAL LAW, 2, 3, 5.

**HIGHWAY.**

*Cattle on, at Intersection with Railway at Rail Level.*—See RAILWAY, 6.

*Power of Municipal Council to Close.*—See WAY.

**HUSBAND AND WIFE.**

1. *Marriage—Action for Declaration of Invalidity—R.S.O. 1897, ch. 162, sec. 31—Motion for Judgment in Default of Defence—Suspicion of Collusion—Trial in Open Court—Oral Evidence.*—The plaintiff, a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. The action invoked the jurisdiction conferred by sec. 31 of R.S.O. 1897, ch. 162, as added by 7 Edw. VII. ch. 23, sec. 8 (O.), and by the statement of claim the plaintiff alleged such facts as brought her claim within that enactment. The defendant did not appear or defend, and the plaintiff moved for judgment upon the statement of claim, supported by affidavits of herself, her mother, and the defendant. The defendant stated that he

procured a marriage license without obtaining the consent of either of the plaintiff's parents; and it was shewn by a certificate that the return of the marriage contained the information that the plaintiff was then 18 years of age:—

*Held*, that, in the circumstances, the motion for judgment was properly refused, and the plaintiff left to proceed to trial in the ordinary way.

*Per* RIDDELL, J.:—No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, *coram populo*, by *vivâ voce* evidence.

Judgment of Teetzel, J., affirmed. *Menzies v. Farnon*, 174.

2. *Co-sureties for Debt of Stranger—Liability of Wife—Absence of Fraud—Findings of Trial Judge—Demeanour of Witnesses—Appeal.*]—A married woman, when contracting otherwise than for the benefit of her husband, has all the capacity of a *feme sole* to bind her separate estate, and there can be no ground for presuming that the husband abused the confidence of the wife by exercising undue marital influence for the benefit of a stranger.

*Cox v. Adams* (1904), 35 S.C.R. 393, distinguished.

And, in the circumstances of this case, where the defendants, husband and wife, became sureties for the debt of a third person, and it was found by the trial Judge that the wife became co-surety with full knowledge of the nature of the obligation which she undertook and without anything in the nature of

fraud, misrepresentation, or undue influence, she was *held* liable to the creditors, the plaintiffs, no circumstances being proved which would relieve the principal debtor from liability.

There was evidence that threats were used to induce the wife to guarantee the debt, but the trial Judge found, upon consideration of the conduct and demeanour of the witnesses, that no such threats were made:—

*Held*, that the Court could not, upon conflicting evidence, reverse this finding.

Judgment of Riddell, J., affirmed. *Sawyer-Massey Co. v. Hodgson*, 333.

## INFANT.

*Custody—Adoption—Rights of Parent—R.S.O. 1897, ch. 259, sec. 12—“Abandoned”—“Deserted”—Payment for Maintenance.*]—The law of this province knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them.

By R.S.O. 1897, ch. 259, sec. 12, where the parent of any child applies to the Court for an order for the production of the child, and the Court is of the opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to make the order:—

*Held*, that “abandoned” and “deserted” involve a wilful omission to take charge of the child, or some mode of dealing



with it calculated to leave it without proper care; and leaving a child with those who had contracted to take proper care of it could not be called "abandonment" or "desertion," nor could the subsequent act of giving up all claim to the child.

Therefore, where the parents of an infant placed her in charge of a stranger, agreeing to pay for her maintenance, and afterwards signed an agreement to give up all claim to the child, an order was made, upon the father's application, for delivery of the child to him, upon an undertaking to pay to the person who had assumed to adopt the child the expense incurred by that person: R.S.O. 1897, ch. 259, sec. 12(2). *Re Davis*, 384.

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## INSURANCE.

See ACCIDENT INSURANCE—  
LIFE INSURANCE.

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## INTEREST.

*Allowed on Compensation for Lands Taken by a Railway Company under Warrant of Possession.*—See RAILWAY, 10.

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## INTOXICATING LIQUORS.

1. *Conviction — Motion to Quash—Appointment of Police Magistrate—Jurisdiction before Issue of Commission—Appointment for Town in Unorganised District—Jurisdiction of Police Magistrate so Appointed—Jurisdiction as ex Officio Justice of the Peace—Police Magistrates Act, R.S.O. 1897, ch. 87, secs. 6, 22, 30.*—Under the Police

Magistrates Act, R.S.O. 1897, ch. 87, sec. 6, conferring power on the Lieutenant-Governor in council to appoint police magistrates, the effective act of appointment is the order in council, and police magistrates so appointed have jurisdiction to act as such before their commissions are issued.

Under sec. 6 of the said Act, by which "the Lieutenant-Governor in council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town," such appointment may be made for a town made such by proclamation, with less than 5,000 inhabitants, in an unorganised district before a council has been elected for it, notwithstanding that by sec. 3(2) no salaried police magistrate shall be appointed for a town with less than 5,000 inhabitants until a resolution of the council affirming the expediency thereof is passed by a vote of two-thirds of the members of the council.

Such magistrate has jurisdiction to act, notwithstanding that there may be another police magistrate appointed for the part of the unorganised district in which the town to which he has been appointed is situate, and this, though he is *ex officio* a justice of the peace, since jurisdiction of a justice of the peace in such a district to adjudicate upon or otherwise act, until after judgment in any case, is excluded (by sec. 22) only if the initiatory proceedings have been taken by or before the police magistrate for the district or part of the district.

On motion to quash a conviction for unlawfully keeping liquor for purposes of sale without a license therefor:—

*Held*, that the magistrate making such conviction, being a police magistrate for the town of Cobalt, correctly described himself as making the conviction as such police magistrate, although, in making it, he was acting in his capacity as *ex officio* justice of the peace for the district of Nipissing.

*Held*, also, that in this case the conviction must be quashed on the ground that no offence was disclosed upon the evidence: and *Regina v. McGregor* (1895), 26 O.R. 114, distinguished in that regard. *Rex v. Reedy*, 1.

2. *Ontario Liquor License Act*, sec. 50—*Unlicensed Hotel—Permitting Liquor to be Consumed*—“*Occupant*”—“*Permit*”—*Mens Rea*.]—The defendant was the owner of an unlicensed public house or hotel, which he had leased to his son; the defendant lived in the hotel as a boarder:—

*Held*, that he was not an “occupant” within the meaning of that portion of sec. 50 of the *Liquor License Act* which provides that the occupant of an unlicensed house shall not “permit any liquor, whether sold by him or not, to be consumed upon the premises.”

*Held*, also, that the word “permit” indicates authorisation, either expressly or tacitly, proceeding from the occupant personally, and involves a *mens rea*; and, there being no evidence that the defendant knew or in any way authorised or connived at the drinking on the premises for “permitting”

which he was convicted, that, even if he were an occupant, the conviction could not be sustained. *Rex v. Irish*, 351.

3. *Liquor License Act—Convictions for Second Offences—Alleged Convictions for First Offences on same Informations—Failure of Evidence to Establish—Unauthorised Distress—Excessive Imprisonment—Summary Convictions Act*, sec. 7, sub-sec. 2—*Certiorari Taken away—Jurisdiction of Justice of the Peace*.]—Upon an application by the defendant to quash two convictions made by a justice of the peace for offences against the *Liquor License Act*, the defendant stated that, having been summoned to appear before the justice at one p.m. on a certain day to answer two charges of selling liquor during prohibited hours, the offences charged not being alleged to be second offences, he went to the justice in the forenoon of the day for which he was summoned, acknowledged his guilt, was found guilty and fined, and paid his fines, and subsequently on the same day, the informations having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offences:—

*Held*, that the principal objection, *viz.*, that the alleged first convictions were bad because the penalties imposed exceeded those authorised for first offences, and that the alleged second convictions were bad because of the existence of the alleged first convictions, failed on the evidence, there having been in fact no convictions at

the earlier hour, and therefore no payment of fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the complaints should be formally heard.

The other objections related to the provision as to the recovery of penalties by distress, which was found in the convictions but not in the minute of adjudication, and the term of imprisonment imposed in default of payment of the fines and costs, the former being, it was urged, wholly unauthorised, and the latter in excess of what is authorised by the Act:—

*Held*, that, assuming both to be valid objections, not to be got rid of by amendment in the present proceedings, they did not entitle the applicant to invoke the aid of the Court to quash the convictions, because by the provisions of sub-sec. 2 of sec. 7 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12, sec. 14 (amended by 4 Edw. VII. ch. 10, sec. 23), the right to *certiorari* is taken away, and therefore the right to apply under the new procedure to quash the convictions, except in cases where there is no adequate remedy by appeal; and the objections were not such as affected the jurisdiction of the justice in such a way as to make the provisions of the sub-section inapplicable.

*Rex v. Cook* (1908), 18 O.L.R. 415, followed. *Rex v. Renaud*, 420.

## JUDGE.

*Duty of, to Interpret Written Rules of Railway Companies.*]—See RAILWAY, 2.

*Jurisdiction of, to Grant Nonsuit after Verdict of Jury.*]—See DIVISION COURTS, 1.

*Power to Rescind Order Committing Judgment Debtor.*]—See DIVISION COURTS, 2.

*Finding of, upon Consideration of the Conduct and demeanour of Witnesses.*]—See HUSBAND AND WIFE, 2.

## JUDGMENT.

*Motion for, to Declare Marriage Invalid.*]—See HUSBAND AND WIFE, 1.

*Appointment of a Receiver is Equivalent to a Judgment for Equitable Execution.*]—See RECEIVER.

See also SUMMARY JUDGMENT.

## JURY.

*Duty of, to Determine Meaning of Technical Terms in Explanatory Evidence Offered.*]—See RAILWAY, 2.

## JURY NOTICE.

*Motion to Strike out—Judge in Chambers—Judge at Trial—Practice—Convenience.*]—*Held*, reversing an order of RIDDELL, J., in Chambers, striking out a jury notice, that in an action of merely common law character the determination as to the method of trial should not be



taken out of the hands of the trial Judge; and that, if he determines that an action on the jury list should be tried without a jury, he should himself try it, because the litigants are entitled to have their cause tried in its order upon the list. The reasons for letting the determination rest with the trial Judge prevail over those of convenience and expedience applied peculiarly to actions tried at Toronto.

Review of the previous decisions. *Stavert v. McNaught*, 370.

### JUSTICE OF THE PEACE.

*Conviction for Selling Intoxicating Liquors without License—Summary Trial—Cross-examination to Credit—Discretion of Magistrate—Criminal Code, sec. 786—Review of Finding.*]—On a charge of selling intoxicating liquor without a license on a certain afternoon, there being another charge pending against the accused for doing the same during the forenoon, and similar charges against other hotel-keepers for doing the same during the forenoon and afternoon of the same day:—

*Held*, that the magistrate had a discretion as to allowing counsel for the accused to ask witnesses on cross-examination whether they had been in the defendant's hotel during the forenoon, and whether they had been in one of the other hotels that forenoon and afternoon, notwithstanding sec. 786 of the Criminal Code, R.S.C. 1906, ch. 146.

*Held*, also, that on a motion to quash the conviction there could

be no review of the finding of the magistrate that there was a sale of intoxicating liquor. *Rex v. Butterfield*, 347.

*Jurisdiction of, ex Officio.*]—*See* INTOXICATING LIQUORS, 1.

### JURISDICTION.

*Of Court of Appeal in Granting Leave to Appeal and Extending Time for Appeal.*]—*See* SUPREME COURT OF CANADA, 1, 2.

*Of Judge to Grant a Nonsuit After Verdict of Jury.*]—*See* DIVISION COURTS, 1.

*Of Magistrate, not Affected by Refusal to Adjourn to Enable Defendant to Obtain Counsel.*]—*See* CRIMINAL LAW, 3.

*Of Municipal Council to Close Highway.*]—*See* WAY.

*Of Coroner to Issue a Warrant for the Arrest of a Witness Disobeying a Summons.*]—*See* CORONER.

*Of the Ontario Railway and Municipal Board as to Enforcing an Agreement.*]—*See* ONTARIO RAILWAY AND MUNICIPAL BOARD.

*Of Magistrate as to Conduct of Proceedings and Admissibility of Evidence before him.*]—*See* CRIMINAL LAW, 5.

*Of Magistrate over Offences against the Ontario Liquor License Act.*]—*See* CRIMINAL LAW, 6.

*Of Drainage Referee, in Action by Contractor for Payment for Construction of Drainage Works, should be left for De-*



*termination at the Trial when the Facts are Investigated.]—See MUNICIPAL CORPORATIONS, 3.*

*Of Arbitrators under the Railway Act to Award Compensations for Lands Taken by a Railway Limited to Determining the Amount.]—See RAILWAY, 10.*

## LANDLORD AND TENANT.

1. *Possession Taken in Expectation of Lease—Encroachment on Adjacent Land of Lessor by Tenant—Covenant for Renewal—Use and Occupation—Action for.]—*The defendant, in 1882, went into possession of certain lands situate on Toronto Island, under the expectation of obtaining a lease thereof for twenty-one years, which was shortly afterwards granted to him by the plaintiffs, owners of the freehold, the lease containing a covenant for renewal. The lands leased were three lots, described in the lease by their numbers on a plan. The defendant, in the belief that a piece of land, not so included, formed part of the lands leased, took possession of it with the the lands actually leased, and occupied the whole. In 1891 the defendant allowed a person to occupy the encroached-upon land as tenant, the latter paying the defendant a yearly rental, it being stated by the defendant in a receipt therefor that such land formed part of his leasehold lands. The defendant's tenant continued to pay the yearly rent until 1905, when the plaintiffs, in making a survey of the lands, discovered the mistake made by the defendant, and notified the tenant not to make any further payments. In an

action for use and occupation of the part encroached upon:—

*Held*, that the defendant could not claim to have acquired a title by possession, under the Statute of Limitations, of the land so encroached upon, for his possession was in his character of lessee, and would therefore be deemed to be that of his landlords, the claim made by plaintiffs for the use and occupation not constituting a repudiation thereof; nor could he claim to have the encroached-upon lands included in the new lease to be given him under the covenant for renewal, for under that covenant he would only be entitled to a lease of the lands actually comprised in the old lease.

*Held*, also, that the plaintiffs were not entitled to claim for the use and occupation of such encroached-upon land prior to the termination of the lease to the defendant, but were entitled thereafter to be paid therefor. *City of Toronto v. Ward*, 214.

2. *Building Lease — Settled Estate—Order of Court Authorising Lease Subject to Approval of Master—Lease Executed with Covenant for Renewal—Rental to be Fixed by Master—Order of Court Transferring Powers of Master to Referee—Award of Referee Fixing Rental—Waiver of Terms of Lease — Informal Submission to Arbitration — Jurisdiction of Referee—Objections to Award — Reimbursement of Lessee for Buildings—Expenditure by Lessee—Potential Value of Property.]—*The lessor, the devisee of land “during his natural life and for him to leave it to any of his children he may please,” agreed to lease it; and an order was made by

the High Court on the 29th September, 1884, under certain Imperial statutes and R.S.O. 1877, ch. 40, sec. 85, declaring that it was proper and consistent with a due regard to the interests of the parties entitled or to become entitled under the will containing the devise, that leases of the land should be authorised, but for periods not exceeding, with renewals, 99 years, and directing that a proper lease should be executed, being first approved of by a Judge or the Master in Ordinary, upon notice to the official guardian, and that such lease should be binding on all persons claiming under the will. Thereupon, with the approval of the Master in Ordinary, a lease was executed for 21 years from the 1st January, 1886, containing a covenant for renewal, subject to the approval of the Master in Ordinary, for a further term of 21 years, and at a rental to be fixed by the Master. By an order of the High Court of the 20th May, 1907, the powers conferred upon the Master by the former order were transferred to an official referee, and it was declared that it should be lawful for the latter to do all acts and exercise all powers which it would be lawful for the Master to do or exercise in pursuance of the former order. The referee then proceeded, in the presence of all parties and without objection, to determine the rental upon evidence, and made an award fixing the amount of the rental for a renewal term:—

*Held*, that the lease, though approved by the officer of the Court, was a contract between the parties thereto, and the provisions as to renewal as much a

contract as any other part; the proper officer to fix the rental was, therefore, the Master, the express contract not being varied by the order of 1907.

But there was nothing to prevent the parties waiving the terms of the contract and agreeing that, instead of the Master fixing the rental, the referee should do so; no formal submission, either oral or written, was necessary; what was done amounted to an informal agreement or submission that the referee should act as arbitrator and fix the rental; and therefore an objection to his award, on the ground that he had no jurisdiction, failed.

Objections to the award, that the referee should have provided for the re-imbursement in whole or in part of the lessee for the buildings, and that he should not have fixed a rental which would imply the expenditure of a considerable sum of money by the lessee, were overruled.

It is not improper in fixing a rental to take into consideration the potential value of the property. *Re Denison and Foster*, 478.

3. *Land Let "for Pasturing Purposes"—Hay Raised by Tenant—Injunction against Selling—"Grazing" and "Pasturing" Distinguished—Breach of Contract—Damages to Land.*—The defendant agreed to rent a farm from the plaintiff "for pasturing purposes," by a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes, the defendant raised a crop of hay on part of the land, which he cut

and stored in his barn and endeavoured to sell:—

*Held*, that the defendant was rightly enjoined from selling and removing from the farm any part of the hay, but that his raising a crop of hay on the farm was not a breach of his contract to use it for "pasturing purposes," as these words did not require that the grass should be severed only by the teeth of the feeding beasts, but permitted him to cut the hay and remove it to his barn, and either use it in feeding his cattle during the winter or leave it on the premises after the termination of the lease.

*Westropp v. Elligott* (1884), 9 App. Cas. 815, discussed and followed.

Judgment of ANGLIN, J., at the trial, as to damages for breach of contract, reversed, but otherwise affirmed. *Bradley v. McClure*, 503.

See LEASE.

## LEASE.

*Condition for Reduction of Rent—Hotel Property—Total Prohibition of Sale of Intoxicating Liquors—Consent of Provincial Secretary—8 Edw. VII. ch. 54, sec. 11(O.)*—A lease to the plaintiff of an hotel business in Orilla contained a proviso that "in the event of any law being enacted . . . which shall prohibit the sale of intoxicating liquors upon the demised premises" the lessor shall make a reasonable reduction in the rent. A local option by-law was passed in Orilla in February, 1908, prohibiting the sale of liquor from and after May 1st, 1908, but was

quashed in June, 1908. Meanwhile, in April, 1908, 8 Edw. VII. ch. 54(O.) was passed, which, by sec. 11, prohibited under such circumstances the issue of the necessary license without the written consent of the Provincial Secretary, who refused it:—

*Held*, that until such consent was obtained there was a law prohibiting sale within the meaning of the above proviso, and the plaintiff was entitled to a rebate in his rent. *Hessey v. Quinn*, 487.

See LANDLORD AND TENANT.

## LIEN.

*Extent of, Given to Railway Company by sec. 345, Dominion Railway Act.*—See RAILWAY, 5.

See MECHANICS' LIENS.

## LIFE INSURANCE.

1. "Legal Heirs"—*Wife and Children—Executor—Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 2, sub-sec. 23—7 Edw. VII. ch. 36, sec. 1(O.)*—In a life insurance certificate of the Canadian Order of Foresters the money secured was expressed to be payable at the death of the insured to his "legal heirs."—

*Held*, that the money was payable to the widow and each of the eight children of the insured in equal shares, and not to his executors to be disposed of as part of his estate. *Re Hamilton and Canadian Order of Foresters*, 121.

2. *Winding-up of Company—Distribution of Deposits and*



*Trust Assets—Dominion Winding-up Act—Dominion Insurance Act—Ontario Insurance Act—Rights of Policy-holders and Beneficiaries—Preferred Class—Payment into Court—Payment out on Death of Assured.*—Where an order had been made for the winding-up of a life insurance company under the Dominion Winding-up Act, and the deposits of the company held by the Minister of Finance and the assets held by trustees under the Dominion Insurance Act were in the hands of the liquidator and were being distributed by him, a question arose as to whether payment should be made, under policies issued by the company, to the assured or to the beneficiaries:—

*Held*, that the intention of the Insurance Act is to provide funds to meet the claims of persons who were resident in Canada at the time the contract with the company was made, and that, both under that Act and the Winding-up Act, the provisions for the distribution of the fund are directed entirely to questions arising as between the company and the assured and between the Canadian policy-holders themselves; there is no interference with rights which may have been acquired by third persons against policy-holders; and the liquidator is bound to take notice of assignments of the policies in respect to which he is making a distribution of the fund, and also of declarations in favour of preferred beneficiaries.

Under the Ontario Insurance Act, the assured may make changes in the members of the class of preferred beneficiaries who are to take; the right of any

beneficiary is not absolute until he shall have survived the assured; and the mere accident that moneys become payable in respect of the policy in the lifetime of the assured, while it does not impair, does not accelerate, the rights of the beneficiaries.

In this case the moneys payable in respect of a policy were ordered to be paid into Court, there to be subject to control of the assured as of a trust fund created under sec. 159 of the Ontario Insurance Act; and, subject thereto, to be paid out, on the death of the assured, to the named beneficiaries then surviving. *Re Mutual Life Association, Wellington's Claim*, 411.

3. *Fraternal Society—Mutual Benefit Fund—Payment of Assessment—Rules of Society—Membership in Good Standing in Primary Lodge—Proofs of Claim for Death Benefit—Refusal of Certificate of Good Standing—Resort to Domestic Tribunals—R.S.O. 1897, ch. 203, sec. 165 (1)—Repayment of Assessments.*] — A certificate of membership issued to McK. in 1889 by the Orange Mutual Insurance Society of Ontario West set forth that he was a member of a certain (primary) Orange Lodge, a member in good standing of the Loyal Orange Association of British America and of the insurance society. He undertook to pay all assessments to the insurance society, and to comply with all laws then or thereafter to be in force; and payment of the insurance was conditioned on proof being made of his good standing, at the time of his death, in the association



and the insurance society. The defendants were incorporated by 53 Viet. ch. 105(D.), and established a benefit fund, and took over the certificates of insurance theretofore issued by the insurance society, and assumed liability therefor. The proofs of death prescribed required that there be a certificate of the primary Lodge that the deceased was a member thereof in good standing at the time of his death.

McK., being in arrear for dues to his primary Lodge, was suspended in 1891 or 1892; in 1896 he applied for reinstatement, but did not pay his arrears; his name never appeared again upon the membership roll of his primary Lodge, and nothing more was heard of him by that Lodge until his death occurred in 1907, when an application was made for a certificate of good standing, which was refused. The annual assessments made by the defendants for the benefit fund had been paid on his behalf by one to whom his certificate had been pledged. The constitution and laws of the defendants and the benefit fund rules were strict in requiring membership in good standing in some primary Lodge to be shewn as a condition of the payment of the insurance benefit; one of the benefit fund rules provided that no member should be entitled to bring an action until he had exhausted all the remedies provided for in the rules by appeal or otherwise; and another rule provided that the members of the mutual benefit society who were in good standing on the 1st January, 1893, should be held to be members in good standing in the defendants' benefit fund on that day:—

*Held*, that if the old rules and the action as to suspension thereunder were to be regarded as governing the deceased, he was not in good standing on the 1st January, 1893, and his good standing was never effectually restored thereafter; and if he was to be regarded as under the new rules (the two sets being worked cumulatively), he was not in good standing at his death. The certificate of good standing being withheld, there was no proof of claim. The primary Lodge not being before the Court, there could be no adjudication as to the *bona fides* of the withholding of the certificate; and it was questionable whether an action could be maintained if an appeal or other remedy had not been resorted to, under the rules.

The provision of sec. 165(1) of the Insurance Act, R.S.O. 1897, ch. 203, does not apply to a case where the payment of monthly dues is fixed by the by-laws, and the dues are collected at the regular meetings; and the original of that provision was not in force when the suspension was declared in 1891 or 1892.

And an action to recover the amount of the insurance was dismissed, but without prejudice to any claim for repayment of the assessments. *McKechnie v. Grand Orange Lodge of British America*, 555.

4. *Benefit of Wife—Insurance Act, sec. 160—Declaration in Writing—Identification of Policies.*—R., whose life was insured in a benefit society, by a pre-nuptial contract gave the insurance certificates to his intended wife, and agreed to have them transferred to her after the

marriage. Two years afterwards, the marriage having taken place, R. replaced the certificates by policies in an assurance company for a larger sum, and made alterations in a copy of the marriage contract in his possession, so that it read that he gave and granted to his wife "the sum of five thousand dollars, being the amount of an insurance effected on his life with the Canada Life Assurance Company," signing his name on the margin opposite the alterations:—

*Held*, that the writing sufficiently identified the policies to meet the requirements of sec. 160 of the Insurance Act, R.S.O. 1897, ch. 203, and operated as a valid declaration under the statute in favour of the wife.

*Re Cheesborough* (1897), 30 O.R. 639, and *Re Harkness* (1904), 8 O.L.R. 720, followed. *Re Roger*, 649.

5. *R.S.O.* 1887, ch. 136, sec. 6—51 *Vict.* ch. 22, sec. 3 (O.)—53 *Vict.* ch. 39, sec. 6 (O.)—*Children and Grandchildren—Apportionment by Policy—Variance by Will.*—M. D. effected policies of insurance upon her life, under which the insurance money upon her death was payable to her "surviving children share and share alike." By her will dated the 10th December, 1894, she directed her trustee to invest the insurance moneys, and the other proceeds of her estate, and, after provisions for the maintenance and advancement of her children, directed that as soon as the youngest should have attained the age of twenty-one years, the trustee should divide the money, or so much as might then remain,

among her "children then surviving or the issue of any child or children deceased:"—

*Held*, that, under the statutes in force at the date of the will, the testatrix had no power to take insurance money that had been apportioned to children, and to give it to grandchildren, and that one of the adult children was entitled to have his share of the fund paid out to him, notwithstanding the fact that all the children had not attained the age of twenty-one years.

*Re Grant* (1895), 26 O.R. 120, followed. *Re Dicks*, 657.

*Presumption of Death and Evidence of, after Seven Years' Absence.*—See DEATH.

## LIMITATIONS (STATUTE OF).

*New Point of Departure, Given by an Order for the Appointment of a Receiver.*—See RECEIVER.

## LIQUIDATOR.

*Duty of, on Distribution of Assets on Winding-up an Insurance Company.*—See LIFE INSURANCE, 2.

## LUNATIC.

*Committee of Estate—Moneys Advanced on Mortgage of Lunatic's Lands—Accounting—Expenditures not Sanctioned by Court—Improvements—Allowance for—Failure to Pass Accounts Yearly—Costs of Accounting—Remuneration of Committee.*—By an order made in 1892 the wife of the plaintiff

was declared a lunatic, and a reference was directed to appoint a committee, who was to give security and pass accounts at least once a year. The defendants' predecessors were (on consent) appointed committee without security, and a report was made in 1893, which shewed the lunatic's estate to consist of a life interest in money in Court and incumbered land, with houses built thereon. The report also shewed that the committee had agreed to advance moneys to pay off the mortgages and for purposes of maintenance, which they did, taking an assignment of the mortgages. The lunatic died in 1899; and the plaintiff in 1906 began an action for redemption against the defendants, as successors of the original committee and assignees of the mortgagees. At the same time an appointment was issued in the lunacy matter for the defendants to bring in and pass their accounts before the referee; and the action was referred to him for trial. The committee had not passed their accounts previously. In 1898 the then committee had, without any authority from the Court, expended money in building a stable on the lunatic's land and in other ways. The committee looked upon the estate as hopelessly insolvent, and regarded themselves as mortgagees in possession. On the passing of the accounts the referee disallowed all payments made by the committee other than for taxes, insurance premiums, interest on mortgages, and minor repairs, and also refused to allow them remuneration for their services, and refused them their costs of accounting, and so reported:—

*Held*, by MEREDITH, C.J.C.P., on appeal, directing a reference back, that the defendants should be allowed for the expenditure upon the stable, if, upon the facts as found, a case should be made which would have been sufficient to have obtained an order permitting the expenditure to be made, had an application been made to the Court for authority to incur it; that the fact that the committee did not pass their accounts annually was not alone sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have been otherwise entitled to have allowed to them; and that the order on appeal should not prejudice the right of the defendants to claim that they were not to be chargeable as committee, but as mortgagees in possession.

This order was affirmed by a Divisional Court.

*Semble*, per BOYD, C., that, had there been no question to go back to the referee as to allowance for improvements, his ruling as to the costs of accounting should not have been disturbed; the onus was still on the committee to satisfy the referee that costs should be given and other allowances made, and how far given and made, notwithstanding the disregard of the order directing an annual passing of accounts. *Re Breen, a Lunatic, Breen v. Toronto General Trusts Corporation*, 447.

#### MAGISTRATE.

*Discretion of, to Grant or Refuse Adjournment to Enable De-*



*fendant to Obtain Counsel.]—*  
See CRIMINAL LAW, 3.

See also JUSTICE OF THE PEACE  
—LIQUOR LICENSE ACT.

### MALICIOUS PROSECUTION.

*Reasonable and Probable Cause—Initiation of Criminal Proceedings—Further Prosecution after Reason for Doubt as to Identity of Offender—Submission to Jury—Withdrawal of Charge—Favourable Termination of Prosecution.]—*Though reasonable and probable cause may exist at the initiation of a prosecution, yet, if it afterwards appears that there is good reason to doubt whether the charge is well founded, the private prosecutor should make reasonable inquiry to clear the doubt, and, if he has obvious means of finding out that the charge is not well founded, he should relinquish the matter or do what he can to dis sever himself from its further prosecution.

Goods obtained from the defendant by fraud were sold to B., and upon the fraud being discovered, the defendant and B., after going over all the events of the transaction, concluded that the plaintiff, who, as an expressman, had called for and delivered the goods, was the guilty one; the defendant laid an information against the plaintiff, and, on the latter being arrested and brought up for identification in presence of the defendant and B., B. declared that the plaintiff was not the man who sold the goods. The only excuse given by the defendant for not then interfering and letting the police know that

there was some mistake was that he did not consider that it was his duty to stop further proceedings, and that the matter was in the hands of the police:—

*Held*, that the defendant's non-intervention at that point was some evidence of a want of reasonable and probable cause, which required that the case should be submitted to the consideration of the jury; and a verdict for small damages should be supported as warranted by the unjustifiable prosecution after the mistake had been discovered.

*Held*, also, that the prosecution had terminated in favour of the accused by the withdrawal of the charge in open court by the Crown Attorney.

*Per* MAGEE, J.:—There was not, upon the undisputed facts, reasonable and probable cause even for the initiation of the prosecution; and the defendant, having instituted the criminal proceedings and made no effort to withdraw from them or stay them, there was evidence for the jury that he was taking part in the prosecution throughout.

Judgment of CLUTE, J., dismissing the action, after a verdict of the jury in favour of the plaintiff, reversed. *Fancourt v. Heaven*, 492.

### MARRIAGE.

*Proceedings to have Declared Invalid.]—*See HUSBAND AND WIFE, 1.

*Impairment of Prospect of, may be Taken into Consideration by Jury in Estimating Damages.]—*See DAMAGES.



## MASTER AND SERVANT.

*Injury to Servant—Hazardous Employment — Unskilled Workman—Absence of Guard—Workmen's Compensation Act—Defect in Ways, Works, etc.—Negligence — Fatal Accidents Act—Action by Widow of Workman—Infant Children—Parties — Damages — Jury — Powers of Trial Judge.*—The defendants, who were contractors for the erection of an eight-story building, used an outside hoist for the purpose of raising the materials required in the construction of the different floors. The hoist stood close against the building, and was made in sections, a new section being added as each floor was reached. It was necessary for the workmen to work upon a platform 8 ft. square, to the corners of which uprights were fixed and secured on the outside by braces. When the last or roof section of the hoist was being erected, the plaintiff's husband, an ordinary labourer employed by the defendants to assist the skilled carpenters whose duty it was to construct the hoist, in stepping forward quickly stumbled and fell off the platform, receiving injuries which caused his death on the following day. There was some evidence that the planks forming the platform were rough and of unequal thickness. The jury found that the accident was caused by the negligence of the defendants, by not having a guard on the inside of the uprights, and by the unevenness of the platform; that the deceased could not have avoided the accident by the exercise of reasonable care; and that he was

not aware of the condition of the hoist:—

*Held*, that, even although it should be considered that there was no evidence that the floor was in fact uneven, or of how the deceased came to fall, the plaintiff was entitled to succeed under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, clause 1, as qualified by sec. 6, clause 1, inasmuch as the death of her husband was found to be caused by a "defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer," and the defect "had not been discovered or remedied owing to the negligence . . . of some person entrusted (by the employer) with the duty of seeing" that the condition or arrangement of the same was proper. The position of an ordinary labourer, like the deceased, was different from that of the skilled workmen who had undertaken the construction of the hoist, and he was entitled to every reasonable safeguard in the performance of so hazardous a duty.

*Brown v. Waterous Engine Works Co.* (1904), 8 O.L.R. 37, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., at the trial, affirmed.

The action being brought by the widow alone, without mention of the infant children of the deceased, it was ordered that they should be added as parties plaintiffs, with proper averments in the statement of claim, or that the latter should be amended so as to shew that the action was brought on their be-

half as well as on behalf of the widow, as required by sec. 8 of the Fatal Accidents Act.

*Quare*, whether the trial Judge had power to enter judgment for a sum greater than the statutory maximum of \$1,500, where the jury were not asked to and did not assess the damages under the Workmen's Compensation Act, but only as at common law. *Linden v. Trussed Concrete Steel Co.*, 540.

### MECHANICS' LIENS.

*Action to Enforce—Judgment—Sale of Land—Arrears of Taxes—Vendor and Purchaser—Rescission of Sale—Plaintiffs' Right to Costs of Resisting Appeal—Costs of Sale Proceedings—Costs of Lienholders—Priority—Master's Report—Appeal.*]  
—The right, title, and interest of certain parties under a lease of lands was offered for sale by the Court, pursuant to a judgment in a mechanics' lien action. The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, though this was not known either to the vendors or purchaser:—

*Held*, that the purchaser took subject to the tax, and the utmost relief to which he was entitled was to have the contract wholly rescinded.

Where, in a mechanics' lien action, the defendants unsuccessfully appealed to a Divisional Court from the judgment at the trial, upholding the liens:—

*Held, per* ANGLIN, J., that the Master (upon a reference for sale of the lands, with a direction that the proceeds of the sale

should be applied in payment of the liens and incumbrances, as the Master should direct, with subsequent interest and costs to be computed and taxed by him) should have added to the amount allowed the plaintiffs the costs of the appeal successfully opposed by them; also that, the judgment in the action having directed the Master to compute and tax subsequent interest and subsequent costs, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings, the same not exceeding 25 per cent. of the judgment recovered (*R.S.O. 1897, ch. 153, sec. 41*), and not merely the disbursements; that the Master properly directed that the costs not only of the plaintiffs, but also of the other lien-holders, should be paid in priority to the judgment debts of both for principal and interest; and that an appeal lies from the Master's report in a mechanics' lien action. *Wesner Drilling Co. v. Tremblay*, 439.

### MINES AND MINERALS.

1. *Surface Rights—Compensation for—Liability Limited to Licensee—Jurisdiction of Mining Commissioner—Inability of Parties to Agree—Necessity for—Jurisdiction of High Court—6 Edw. VII. ch. 11, sec. 119 (O.)—7 Edw. VII. ch. 13, sec. 33 (O.)*]  
—The compensation payable, under sec. 119 of the Mines Act of 1906, 6 Edw. VII. ch. 11 (O.), as amended by sec. 33 of the Mines Act of 1907, 7 Edw. VII. ch. 13 (O.), for damage done to surface rights in lands in the working of a mining claim, is claimable only against

the licensee who staked out the claim, and not against his transferee.

Judgment of TEETZEL, J., affirmed. *Bassett v. Clarke Standard Mining and Developing Co.*, 38.

2. *Surface Rights—Mining Commissioner—Compensation for Surface Rights—Mining Claims on Town Sites*—6 Edw. VII. ch. 11, secs. 109, 119 (O.)—*Temiskaming and Northern Ontario Railway Commission*—4 Edw. VII. ch. 7 (O.)]—Section 109 of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), which provides that no mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site, whether the same shall have been subdivided into town lots or not, except by order of the Minister, refers to town sites transferred by order in council to the Temiskaming and Northern Ontario Railway Commission under 4 Edw. VII. ch. 7, sec. 3 (O.), and not to lands merely included on plans registered by private individuals and subdivided by them into small lots, with streets and avenues. *Western and Northern Lands Corporation v. Goodwin*, 63.

3. *Withdrawal of District from Location and Exploration—Orders in Council—Property and Civil Rights—British North America Act, 1867—Provincial Act Disposing of Rights sub Lite—Intra vires—Constitutional Law—Crown as Party to Action—Notice to Attorney-General of Constitutionality of Act being in Question—Precious Metals*—7 Edw. VII. ch. 15 (O.)—*Mines*

*Act—R.S.O. 1897, ch. 36 (O.)—6 Edw. VII. ch. 11 (O.)*]—The plaintiffs claimed to be entitled to a certain mining location situated under part of Cobalt Lake, on the ground that their assignor had fulfilled all the requirements of the Mines Act, and had transferred his rights to them. At the time their assignor made his alleged discovery and staked out his claim, neither he, nor any one assisting him, had obtained a miner's license, and Cobalt Lake had been by order in council withdrawn from location and exploration, as he might have ascertained if he had made inquiry from the proper authority. Moreover, subsequently a sale of the mining locations in question, in spite of the plaintiffs' protests, had been made by the Crown to the defendants in January, 1907, and pending this action, 7 Edw. VII. ch. 15 (O.) had been passed confirming the sale and vesting the fee simple absolute in the lands and in all mines and minerals being and lying in or under the lands, and all mining rights therein and thereto, in the purchasers, the defendants, as and from the date of the sale, free from all claims and demands of every nature whatever in respect of or arising from any discovery location or staking:—

*Held*, that the said Provincial Act was a public Act and *intra vires* as relating to both property and civil rights in the Province, and, although enacted during the pendency of this action, was absolutely conclusive against the claim of the plaintiffs.

The fact that the Attorney-



General or his representative may attend the hearing of a case, under notice served upon him that the constitutional validity of an Act of the Legislature is called in question, does not enlarge the jurisdiction of the Court in respect to any substantial relief sought in the action, and, if the Crown has not been made a party to such action, the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.

*Semble*, that in a Crown grant of a mining location which was expressed to be subject to the provisions of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), secs. 188 to 221, and which granted both the land and the mining rights, as well as the mines and minerals thereunder, metals and minerals of every description, including the precious or royal metals, passed.

Sections 3, 4, and 5 of the Mines Act, R.S.O. 1897, ch. 36, and secs. 2 (16), 3(1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals. *Florence Mining Co. v. Cobalt Lake Mining Co.*, 275.

## MUNICIPAL CORPORATIONS.

1. *Sewer By-law—Disqualification of Member of Council—Private Interest—Consolidated Municipal Act, 1903, sec. 668, sub-sec. 4—3 Edw. VII. ch. 19 (O.)*—A member of a city council is not disqualified from voting upon a proposed by-law to construct a sewer on a cer-

tain street within the municipality merely because he owns property fronting on the street, which gives him a large interest in the proposed drainage. The principle that a member of a council is not disqualified merely because he possesses an interest in common with the other ratepayers applies as well where a local improvement by-law being in question, the community of interest is only with the ratepayers of a section of the municipality, as where all the ratepayers will be affected by the proposed by-law.

*Re McLean and Township of Ops* (1880), 45 U.C.R. 325, discussed and followed.

Judgment of ANGLIN, J., reversed. *Elliott v. City of St. Catharines*, 57.

2. *Road Allowance—Road Opened up in Lieu thereof—No Compensation to Owners, but Original Road Allowance Taken by them—Subsequent Intention to Abandon Road so Laid out and Open up Original Road Allowance—Necessity of Compensation therefor—Notice of Intention to Open up such Road Allowance—Sufficiency of.*—On a survey made in 1791, a road allowance was set out along the front of certain lots, which ran down to a lake. The road allowance, however, was not opened up, or used as a road, but some time prior to 1850 a road running along the lake shore, the land therefor being taken from these lots, was, as a matter of convenience, opened up and used in lieu of the original road allowance, and continued to be so used ever since, the township doing work and



expending money thereon. No compensation was paid to the owners; but they took over and enclosed the road allowance as part of their lands, and occupied it for a period of some sixty years. In consequence of the waters of the lake encroaching on the lake roadway, it had, from time to time, to be moved back, these owners giving the lands for the purpose without any compensation. In 1908, by reason of the expense occasioned in keeping this road in repair, through the encroachment, the township council determined to open up the original road allowance, and served a notice on the owners of the lots stating that a by-law would be introduced for this purpose on a named day, but without making any offer of compensation:—

*Held*, that the notice was sufficient; for, even if the time of the meeting should have been stated in the notice, as it appeared that the applicants had either attended the meeting, or were represented by counsel, and were heard before the by-law was passed, they were now precluded from objecting thereto.

*Held*, however, that, as no compensation was paid for the lands originally taken for the lake shore road, or from time to time therefor as the road was encroached upon, and the applicants being legally in possession of the lands constituting the original road allowance, such lands could not be taken away from them, for the purpose of opening up the road, without their being awarded compensation, as provided for in sec. 641 of the Municipal Act, 3 Edw. VII. ch. 19 (O.); and the by-law for the opening up of the

road was therefore quashed. *Lister v. Township of Clinton*, 197.

3. *Drainage — Municipal Drainage Act, sec. 93—Claim for Payment for Construction Work—Forum—Action in High Court — Pleading — Summary Dismissal for Want of Jurisdiction—Drainage Referee.*]—Section 93 of the Municipal Drainage Act, as enacted by 1 Edw. VII. ch. 30, sec. 4, deals only with cases of damages occasioned to others by reason of the construction of drainage works in the way provided for by the municipality, and does not refer to the claim of a contractor or workman to be paid for work performed; and therefore an action brought in the High Court which appears by the statement of claim to be one to enforce payment of such a claim should not be summarily dismissed on the ground that the Drainage Referee alone has jurisdiction; but the question of jurisdiction should be left for determination at the trial, when the facts are investigated; MEREDITH, J.A., dissenting.

Whether the point of law raised is brought up for hearing and disposal under Rule 259 or Rule 373, the party raising it must admit, for the purposes of the argument, that the pleading on which it is alleged that the question arises is true in fact; and for the purposes of the argument the allegations of the statement of defence ought not to be regarded.

Judgments of FALCONBRIDGE, C.J.K.B., and a Divisional Court, reversed. *Bank of Ottawa v. Township of Roxborough*, 511.

**MUNICIPAL ELECTIONS.**

*Proper Voters' List—Use of Wrong List—Irregularity—Consolidated Municipal Act, 1903, secs. 148, 204(O.)*—Inasmuch as sec. 148 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), enacts that the proper list of voters to be used at municipal elections shall be the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4 (O.), even though a later list has been validly certified by the Judge, but not delivered or transmitted to the clerk of the peace, at all events before the opening of the poll on polling day, it is not the proper list of voters to be used at the election.

*Semble*, that the list to be used must be a list that has been certified by the Judge and delivered or transmitted to the clerk of the peace before the time at which nomination takes place.

*Held*, that the use of a wrong list is not such a non-compliance with the Act as to the taking of the poll or such an irregularity as may be held cured by the provisions of sec. 204 of the Consolidated Municipal Act.

*Quære*, whether a list certified on Sunday can be valid. *Rex ex rel. Black v. Campbell*, 269.

**NEGLIGENCE.**

*Death of Adopted Child — Fatal Accidents Act—Con. Rule 261.*—The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under the Fatal Accidents Act, R.S.O.

1897, ch. 166, sec. 1, sub-sec. 2. *Blayborough v. Brantford Gas Co.*, 243.

*Findings of and against.*—*See* STREET RAILWAYS.

**NEW TRIAL.**

*See* STREET RAILWAYS.

**NOTICE.**

*Sufficiency of, on Opening up a Road Allowance.*—*See* MUNICIPAL CORPORATIONS, 2.

**OFFICIAL GUARDIAN.**

*Approval of, to Register Caution when Land has Vested in Adult and Infant and Effect of.*—*See* DEVOLUTION OF ESTATES ACT.

**ONTARIO RAILWAY AND MUNICIPAL BOARD.**

*Jurisdiction—Street Railway—Control and Management by Commissioners—Agreement between Municipalities—Enforcement—Possession of Railway—Statutes.*—Under an agreement made between two municipalities and confirmed by the statute 8 Edw. VII. ch. 80 (O.), one of the municipalities was, on payment of the amount of an award, to become the owner of a part of an electric railway which theretofore had been owned by the other, although operated in both municipalities, and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided

for in the statute and agreement. The amount awarded having been paid, and the appellants, a board of commissioners who had been operating the railway for the municipality which owned it, retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Ontario Railway and Municipal Board was applied to, and such compliance was enforced by its order:—

*Held*, that the Board did not thereby exceed the powers conferred upon it by the Ontario Railway and Municipal Board Act, 1906.

Construction and effect of sec. 16 of that statute, and of 56 Vict. ch. 78, the Ontario Railway Act, 1906, and 8 Edw. VII. ch. 80. *Re Port Arthur Electric Street Railway*, 376.

### PARLIAMENTARY ELECTIONS.

*Dominion Controverted Elections Act—Preliminary Objections—Petition Presented too Late—Application to Extend Time—Jurisdiction—R.S.C. 1906, ch. 7, secs. 5, 12, 13, 87.*—The petition was delivered to the registrar, not at his office, but at his residence, after office hours, on the last day upon which, according to sec. 12 of the Dominion Controverted Elections Act, it could be filed:—

*Held*, that the petition was presented too late.

*The North Bruce Case* (1891), 27 C.L.J. 538, distinguished.

The Court has no power to extend the time for presenting a petition after the expiration of the time for presenting it prescribed by the Act has elapsed, and to such a case sec. 87 of the Act has no application.

The principle of the *Glen-garry Case* (1888), 14 S.C.R. 453, applied and followed. *Re North Perth Dominion Election, Money v. Rankin*, 661.

### PARTNERSHIP.

*Liability of a Partner Joining with the Firm in Making a Promissory Note for the Price of Goods Supplied to the Partnership.*—See BANKRUPTCY AND INSOLVENCY.

### PLEADING.

*Counterclaim—Receivers and Managers under Order of Court—Proceeding against, without Leave of Court—Motion to Strike out Counterclaim—Appeal on Matter of Procedure—Con. Rule 251.*—A paper manufacturing company having become financially embarrassed, J. C. and G. E. were appointed by the Court joint receivers and managers to carry on the business of the company on behalf of debenture holders to whom its property and assets had been mortgaged. Previously to this appointment the company had entered into contracts with the defendants to supply them with paper at certain prices for certain periods of time, and after their appointment it was alleged that J. C. and G. E. had continued to deal with the defendants under these contracts,



and other contracts into which J. C. had entered at a time when he was acting as sole receiver and manager. J. C. and G. E. at various times assigned the indebtedness of the defendants under these contracts to the plaintiffs, who brought this action to enforce payment. The defendants thereupon set up a counterclaim, adding J. C. and G. E. as defendants thereto, and alleging that J. C. and G. E. had wrongfully terminated these contracts at a time when they were in full force, on which account the original defendants were obliged to enter into contracts with other manufacturers of paper at a greatly increased price, whereby they suffered and would suffer damages greatly in excess of the amount claimed by the plaintiffs, which damages they claimed to set off against the claim of the plaintiffs to the extent of that claim, and they counterclaimed for the balance of their damages against J. C. and G. E.:—

*Held*, affirming the orders of MEREDITH, C.J.C.P., and a Divisional Court, that the counterclaim should be struck out as against J. C. and G. E., but that the original defendants should be at liberty to amend their pleadings so as to make the counterclaim a defence to the action.

Remarks upon the difference in scope between Con. Rule 251 and the corresponding English Rule 199.

*Semble*, that an appeal did not lie to the Court of Appeal against the order of the Divisional Court, the matter being one of procedure only, not affecting the ultimate rights of the

parties. *Sovereign Bank of Canada v. Parsons*, 665.

### POLICE MAGISTRATE.

*Power to Act, after Appointment by Order in Council, but before Commission Issued.*] — See INTOXICATING LIQUORS, 1.

*Appointment of, in Unorganised District, before a Council is Elected.*] — See INTOXICATING LIQUORS, 1.

### POLICY-HOLDERS.

*Rights of, on Winding up Insurance Company.*]—See LIFE INSURANCE, 2.

### POSSESSION.

*Of Land, taken in Expectation of Lease.*]—See LANDLORD AND TENANT.

### PRACTICE.

*See* COUNTY COURT APPEAL—PLEADING — SUPREME COURT OF CANADA — VENUE — WRIT OF SUMMONS.

### PRESUMPTION.

*Of Death—Absence for over Seven Years, Evidence of.*]—See DEATH.

### PRINCIPAL AND AGENT.

*Agency for Sale of Money Orders — Carriers — Contract — Undertaking of Agent to Account for Orders and Proceeds—Theft and Forgery by Servant*



*of Agent—Payment—Liability of Agent.*—The defendant, on appointment as agent for the sale of the signed money orders of an express company, agreed in writing to be responsible for the “due issue and sale thereof” and “to account for each money order and the proceeds thereof.” An employee of the defendant stole a book of money orders, forged the defendant’s counter-signature (which was required), and issued orders which the plaintiffs, being unaware of the forgeries, paid, and now brought this action for the amount:—

*Held*, that the defendant was not liable, inasmuch as the money orders in question had not been issued or sold by him, and that he had duly accounted for them by shewing that, without negligence on his part, they had been stolen from him, and he was therefore unable to return them.

*Seemle*, also, that, even if the orders had in fact been countersigned by the defendant, they would not have been binding on the company, inasmuch as to issue them, when the money they represented had not been received by him, would be an act outside the scope of his authority as agent, and for this reason the plaintiffs could not recover.

*Erb v. Great Western R.W. Co.* (1877-1881), 42 U.C.R. 90, 3 A.R. 446, 5 S.C.R. 179, followed.

*Held*, further, that, even if there was a breach of the defendant’s contract, the plaintiffs suffered no damage by it, as they incurred no liability to the payee or transferee of the money orders, inasmuch as neither of the latter would be entitled to sue upon them, there

being no privity of contract between them and the plaintiffs. *Dominion Express Co. v. Krigbaum*, 533.

## PRINCIPAL AND SURETY.

*Banks and Banking—Crediting Customer with Amount of Note—Discount—Collateral Security—Separate Instruments—Sureties in Different Amounts—Contribution by Sureties.*—A bank, wishing to close an account on which a balance of \$1,000 of advances to the customer remained unpaid, took a joint and several demand note for \$1,000 of the customer and another as surety, payable to it, with interest, and credited the customer’s account with its face value, writing the word “disc.” before the credit entry:—

*Held*, that it was open to the bank to shew that the note was in fact taken by it as collateral security merely, and not in payment of the balance due so as to release the accommodation makers of two other notes held by it as collateral security in respect to the same account.

Sureties by different instruments for the same principal debt are liable to contribute in proportion to the respective amounts for which they have agreed to be sureties.

A person as surety made a note for \$3,000 to be held by a bank as security for advances to be made to a customer, and the ultimate balance thereof, and two others, as sureties, made a joint and several note for the like amount and for the same purpose, and another, as surety, made a note for \$1,000 for the same purpose:—

*Held*, that they were liable to contribute respectively in the proportion of three-sevenths, three-sevenths, and one-seventh of the ultimate balance requiring to be paid off. *Ostrander v. Jarvis*, 17.

### PRODUCTION.

*Of Tax Deed, not Sufficient to Prove Title.*]—See ASSESSMENTS AND TAXES, 1.

### PROOF.

*Onus of Proving a Sale for Taxes as Valid, is on the Party Setting up the Tax Deed.*]—See ASSESSMENT AND TAXES, 1.

### PROMISSORY NOTE.

*Irregular Endorsement—Liability by Signature—Bills of Exchange Act.*]—On the back of certain promissory notes given by S. to the order of H. appeared the signatures of K. and B., underneath the words, "We guarantee payment of the within note:"—

*Held*, that K. and B. were liable as endorsers.

*Locke v. Reid* (1842), 6 O.S. 295, not followed as no longer representing existing law, having regard to the course of decision, and the effect of sec. 131 of the Bills of Exchange Act. *Lehigh Cobalt Silver Mines Co. v. Heckler*, 615.

### PROSECUTION.

*The Withdrawal, by the Crown Attorney in Open Court,*

*of a Charge, Terminates the Prosecution in Favour of the Accused.*]—See MALICIOUS PROSECUTION.

### PUBLIC SCHOOL TRUSTEES.

*Powers of—Building School House—Employing Architect to Prepare Plans—Rejection of By-law Authorising Necessary Expenditure—Action of Architect for Fees—Quantum Meruit.*]—It is within the power of trustees of public schools to employ an architect for hire to prepare plans, etc., for a proposed school house, and an architect who has prepared such plans is entitled to be remunerated on a *quantum meruit*, even though a by-law authorising the necessary expenditure for the building is rejected by the municipal council or electors; *Boyd, C.*, dissented on the ground that the plaintiff was not entitled to be paid upon the special circumstances.

Judgment of *MACMAHON, J.*, at the trial, reversed. *Erb v. Dresden Public School Board*, 295.

### RAILWAY.

1. *Sheep Escaping to Adjoining Farm and thence upon the Railway Track—Injury thereto—Opening under Gate at Farm Crossing—Openings also in Fence.*]—The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a

farm crossing on the adjoining owner's farm which had been raised by the defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track:—

*Held*, that the defendants were liable under sec. 294(4), even assuming that the sheep got upon the track through the opening under the gate.

The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway premises. *Higgins v. Canadian Pacific R.W. Co.*, 12.

2. *Collision — Negligence — Rules of Railway Company — Construction of Rules — Functions of Jury.*]—In an action for damages for the death of an engine driver of the Grand Trunk Railway Co., whose train came into collision with a train of the defendants, it was contended by the defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Questions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased:—

*Held*, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applic-

able to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened.

It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them, on the explanatory evidence offered. *Walker v. Wabash R.W. Co.*, 21.

3. *Expropriation—Renewable Lease—Occupation after Expiration of Term without Renewal—Tenancy at Will—Compensation—"Persons Interested" in the Land—Right to Renew for Part — Railway Act, R.S.C. 1906, ch. 37, sec. 155.*]—Lessees under a renewable lease, or their assignees, where the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not "persons interested" in the land within the meaning of sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, and therefore are not entitled to compensation for expropriation of any part of the lands demised.

Judgment of RIDDELL, J., reversed. *Canadian Pacific R.W. Co. v. Alexander Brown Milling and Elevator Co.*, 85.

4. *Live Stock Contract—Restriction of Liability—Contract made in the United States for Transit of Stock to Canada—Provisions of Contract Similar to those Approved by Railway Board—Validity of Contract—Railway Act, R.S.C. 1906, ch.*



37, secs. 284(7), 340.] — The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went, and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway company on their own behalf, as well as on behalf of the connecting lines. The contract contained a provision that, on payment of a specified rate of freight, being a rate lower than that which the company were entitled to charge, liability was to be limited to an amount not exceeding \$100 for each animal, or a total liability not exceeding \$1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37. The horses were carried by the contracting railway company as far as their line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—

*Held*, that by the terms of the contract it applied not only to the railway company with which it was made, but to the con-

necting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved. *Sutherland v. Grand Trunk R.W. Co.*, 139.

5. *Carriage of Goods — Delivery to Consignee—Seizure by Railway Company for Unpaid Tolls—Dominion Railway Act, sec. 345 — “Seize” — Termination of Carrier's Lien—Demand — Conversion—Damages.*]—By sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, “seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof,” etc.:—

*Held*, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.

*Seemle*, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized



goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.

*Held*, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods. *Clisdell v. Kingston and Pembroke R.W. Co.*, 169.

6. *Cattle at Large—Competent Person—Boy of Ten—Judgment* —*R.S.C. 1906, ch. 37, sec. 294.*] —Section 294 of the Railway Act, R.S.C. 1906, ch. 37, enacts that “no horses . . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway.

“(3) If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured.”

The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants’ line of railway. A train of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a “competent person” within the meaning of the above section:—

*Held*, that the plaintiff was entitled to judgment. *Sexton v. Grand Trunk R.W. Co.*, 202.

7. *Fire from Locomotive — Damage to “Standing Bush” — Conflicting Evidence—Findings of Jury — Dominion Railway Act, sec. 298 — “Lands” — “Plantations” — Interpretation of Statutes.*] — In an action brought under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, to recover the amount of damage caused to “standing bush” on the plaintiff’s land by a fire, alleged to have been started by a locomotive of the defendants, there was a conflict of evidence as to whether the fire which actually did the damage spread to the plaintiff’s land from a fire started by the defendants’ locomotive, or from a fire started on the land of one H.:—

*Held*, that there was evidence to justify the written finding of the jury that the damage to the plaintiff’s property was caused by fire from the defendants’ locomotive, and that an apparently inconsistent oral response made by the foreman to a question put by the trial Judge was, on the evidence, reconcilable with the written finding.

*Held*, also, that “standing bush” comes within the provisions of sec. 298, being included in “lands,” notwithstanding the occurrence of “plantations” in the words of the enactment, “crops, lands, fences, plantations, or buildings and their contents.”

In regard to legislation of this kind, the rule is to adopt the construction most beneficial to the public: see sec. 15 of the Interpretation Act, R.S.C. 1906, ch. 1. *Campbell v. Canadian Pacific R.W. Co.*, 466.

8. *Destruction of "Crops"*—*Sparks from Locomotive*—*Marsh Hay Cut and Baled*—*Railway Act, R.S.C. 1906, ch. 37, sec. 298.*]—The Railway Act, R.S.C. 1906, ch. 37, sec. 298, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage:"—

*Held*, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives.

Judgment of TEETZEL, J., and a Divisional Court reversed. *Fraser v. Père Marquette R.W. Co.*, 589.

9. *Fences*—*Statutory Obligation as to*—*Gap left in Fence*—*Animals*—*Injury to*—*When "at Large"*—*Contributory Negligence*—*Proximate Cause*—*Cause of Action*—*Lands Inclosed and either Settled or Improved*—*Onus of Proof*—*Dominion Railway Act, secs. 254, 294, 427.*]—The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they had left a gap, through which the horses strayed on to the track, where

they were run down by a train and killed:—

*Held*, that the horses were not "at large" within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as "suffering" their animals to "enter upon" the railway, and so losing their right of action under sec. 295(e).

(2) There is no express provision in the present Railway Act equivalent to sec. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. ch. 24, sec. 9(D.), under which it was decided in *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute.

(3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by sec. 254 of the Railway Act to "erect and maintain upon the railway" fences "suitable and sufficient to prevent . . . animals from getting on the railway," for breach of which duty a statutory right of action against the company is given by sub-sec. 2 of sec. 427 of the Act, to any person injured, for

the full amount of damage sustained thereby.

(4) *Primâ facie* the fence was erected by the company in accordance with their statutory obligation to do so where the lands through which the railway passes are "inclosed and either settled or improved" (sec. 254, sub-sec. 4); and the onus lay on the defendants to shew that at the time when the fence was erected, it was not "required" by the Act.

*New Brunswick R.W. Co. v. Armstrong* (1883), 23 N.B.R. 193, approved and followed.

Judgment of CLUTE, J., affirmed. *McLeod v. Canadian Northern R.W. Co.*, 616.

10. *Compensation Awarded for Lands Taken—Interest—Jurisdiction of Arbitrators—Possession taken by Company under Warrants of Possession—Payment of Money into Court—Payment out—Rate of Interest.*—The power conferred on arbitrators appointed under the Railway Act, R.S.C. 1906, ch. 37, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely, the date of the filing of the plan, etc.

*Re Canadian Northern R.W. Co. and Robinson* (1908), 17 Man. L.R. 396, approved of; *Re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, dissented from.

Cases decided under the arbitration sections of the Municipal Act distinguished.

Prior to the making of the awards, possession of the lands was taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded:—

*Held*, that the owners were entitled to have paid to them, out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent., payable from the date of the warrants of possession until the date of the payment out.

*Re Lea and Ontario and Quebec R.W. Co.* (1885), 21 C.L.J. 154, *Re Taylor and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 371, and *Re Philbrick and Ontario and Quebec R.W. Co.* (1886) 11 P.R. 373, referred to and discussed. *In re Clarke and Toronto Grey and Bruce R.W. Co.*, 628.

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#### RAILWAY BOARD (DOM.).

*Contract, Approved by.*—See RAILWAY, 4.

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#### RAILWAY AND MUNICIPAL BOARD (ONT.).

*Order of.*—See ONTARIO RAILWAY AND MUNICIPAL BOARD—STREET RAILWAYS.



## REASONABLE AND PROBABLE CAUSE.

*Want of, after Initiation of Criminal Proceedings, even if Existing at Time of Initiation, Effect of.*]—See MALICIOUS PROSECUTION.

## RECITAL.

*In Deed, Controlling Effect of.*]—See SALE OF LAND.

## REFEREE.

*Substitution of, for Master in Ordinary.*]—See LANDLORD AND TENANT, 2.

## RECEIVER.

*Equitable Execution—Life of Judgment—Statute of Limitations.*]—A judgment for payment of money was recovered by the plaintiffs against the defendant in 1883, and, nothing having been paid thereon, an order was made in 1892 appointing a receiver to receive the defendant's share or interest in the estate of his father, to the extent of the judgment. That interest was not available until the death of the defendant's mother, which did not occur until 1908; and it was then contended by the defendant that the judgment was barred under the Statute of Limitations, and the receiver should be discharged:—

*Held*, that the order for a receiver was in effect equivalent to a judgment for equitable relief, and gave a new point of departure for the Statute of Limitations, if that was material.

But the statute had no application to the actual condition of affairs; the process of equitable execution had been current in respect of the debtor's possible assets, and nothing more could be done than to let the receiving order remain in *statu quo* till the death of the life-tenant and the survival of the reversioner made it possible for the machinery of the Court to become again active.

Order of TEETZEL, J., affirmed. *Kinnear v. Clyne*, 457.

## RELEASE.

*Validity — Judgment against Defendant in Action for Seduction — Pending Appeal — Consideration — Agreement to Pay Costs—Religious Influence Exercised by Strangers to Defendant — “Undue Influence” — Verdict of Jury—Motion to Set aside.*]—The plaintiff, having obtained a verdict and judgment for \$1,200 against the defendant in an action for seduction of the plaintiff's daughter, while an appeal by the defendant from the judgment was pending, executed a release of the judgment, upon the defendant paying the plaintiff's costs of the action. The plaintiff was induced to do this by the persuasions of the bishop, and one H., a member, of the congregation of a church to which the plaintiff belonged, and by their threats that, unless he made a settlement of the action, he would be expelled from the church, the tenets of which forbade the members to go to law. The bishop and H. acted in good faith, from religious motives, and were not in any sense agents of the de-



feudant. The principal object of the plaintiff in bringing the action was to secure maintenance for his daughter's child, and H. promised that the child would be cared for:—

*Held*, that, the consideration for the release being substantial, and the influence to obtain it having been exercised without the defendant's knowledge or procurement, and for a purpose entirely foreign to him, the release was binding on the plaintiff, even though the spiritual influence exercised was "undue influence," which was doubtful.

Judgment of MACMAHON, J., upon the trial of an issue as to the validity of the release, reversed.

A motion by the defendant to set aside the verdict, and the judgment for \$1,200 and for a new trial, was dismissed, there being evidence which, if believed by the jury, justified the verdict. *Lehman v. Kester*, 395.

## REVENUE.

*Succession Duty*—"Aggregate Value"—*Rate of Duty*—*Statutes*—*Retrospective Construction*.]—Where the deceased died on June 24th, 1904, and the gross value of his estate was over \$200,000, but the net value, after deducting debts, encumbrances, and charges, was under \$100,000:—

*Held*, that the estate was liable to a succession duty at the rate of five per cent. on the net value, under R.S.O. 1897, ch. 24, as amended by 1 Edw. VII. ch. 8, sec. 3; and that the later statute, 5 Edw. VII. ch. 6, under which the duty would only be two per cent., could not

be given a retrospective operation, while the statute 7 Edw. VII. ch. 10, notwithstanding sec. 2 thereof, did not apply to the case or affect the matter. *In re Lee*, 550.

## RULES.

Con. Rule 162.]—*See* WRIT OF SUMMONS.

Con. Rule 251.]—*See* PLEADING.

Con. Rule 259.]—*See* MUNICIPAL CORPORATIONS, 3.

Con. Rule 373.]—*See* MUNICIPAL CORPORATIONS, 3.

Con. Rule 603.]—*See* COUNTY COURT APPEAL.

## SALE OF LAND.

*Recital*—*Covenant*—*Additional Consideration if Sold*—*Rule against Perpetuities*—*Lien on Lands*—*Personal Remedy*.]—The plaintiff sold certain land to E. and S., the deed containing a recital that the plaintiff had agreed for \$200 to sell the land to E. and S., their heirs and assigns, for railway purposes, with a proviso that the land should remain the absolute property, in the possession of, and under the absolute control of E. and S., and should not be fenced in otherwise than as provided in the deed; and in the event of E. and S. selling, etc., the land, or erecting a fence contrary to the terms of the deed, E. and S., or their heirs, executors, administrators or assigns, should immediately pay to the plaintiff, his executors, administrators, or assigns, the further sum of \$500 as additional consideration for the sale of the

land, making in all \$700 therefor. The land, in consideration of the payment of the \$200 and the further consideration of the several covenants to be kept and performed by E. and S., their heirs and assigns, was then conveyed to them. The covenant was in effect that E. and S., for themselves, their heirs and assigns, covenanted with the plaintiff that they, the said E. and S., or their heirs or assigns, would, in the event of their disposing of or conveying the said land, immediately pay to the plaintiff the further sum of \$500. E. and S. sold and conveyed the land, with other lands, to the E. and S. company, subject, in express terms, to the covenants set out in the original deed; and the E. and S. company sold and conveyed the lands, with other lands, to the defendants, also subject to the covenants. In an action to recover \$500 for the breach of the covenant not to sell, claiming the payment of the \$500, a lien on the lands, and a personal remedy against the defendants:—

*Held*, affirming the judgment of BOYD, C., at the trial (RIDDELL, J., dissenting), that the plaintiff was entitled to a lien on the land, and to a sale thereof to realize the lien, the rule against perpetuities not applying, for, though under the covenant it might be held applicable, that was controlled by the recital; but reversing the judgment in so far as it gave a personal remedy against the defendants. *Quart v. Eager*, 181.

### SERVICE.

*Order for, of Writ of Summons out of Ontario.*] — See WRIT OF SUMMONS.

### STATUTE OF LIMITATIONS.

*New Point of Departure, Given by an Order Appointing a Receiver.*]—See RECEIVER.

### STATUTES.

*Enacted even During Pendency of Litigation Absolutely Conclusive.*] — See MINES AND MINERALS, 3.

*Retrospective, Construction of.*]—See REVENUE.

29 Car. II. ch. 3, sec. 4 (Statute of Frauds).....  
See CONTRACT, 3.

The British North America Act, 1867 .....  
See MINES AND MINERALS, 3.

The Consolidated Railway Act, 1879, sec. 16 .....  
See RAILWAY, 9.

46 Vict. ch. 24, sec. 9 (D.) .....  
See RAILWAY, 9.

R.S.O. 1877, ch. 40, sec. 85.....  
See LANDLORD AND TENANT, 2.

51 Vict. ch. 22, sec. 3 (O.) .....  
See LIFE INSURANCE, 5.

R.S.O. 1887, ch. 136, sec. 6 .....  
See LIFE INSURANCE, 5.

53 Vict. ch. 39, sec. 6 (O.) .....  
See LIFE INSURANCE, 5.

53 Vict. ch. 105 (D.) .....  
See LIFE INSURANCE, 3.

55 Vict. ch. 48, sec. 137 (6) (Consolidated Assessment Act, 1892)....  
See ASSESSMENT AND TAXES, 1.

62 Vict. ch. 11, sec. 9 (O.) .....  
See DIVISION COURTS, 1.

R.S.O. 1897, ch. 24.....  
See REVENUE.

R.S.O. 1897, ch. 36 (O.), sees. 3, 4, and 5 (Mines Act) .....  
See MINES AND MINERALS, 3.

R.S.O. 1897, ch. 62, sec. 41.....  
See ARBITRATION AND AWARD.

- R.S.O. 1897, ch. 87, secs. 3(2), 6, 22, 30.....  
*See* INTOXICATING LIQUORS, 1.
- R.S.O. 1897, ch. 90, sec. 7, sub-sec. 2 (The Ontario Summary Convictions Act).....  
*See* CRIMINAL LAW, 6—INTOXICATING LIQUORS, 3.
- R.S.O. 1897, ch. 97, sec. 5.....  
*See* CORONER.
- R.S.O. 1897, ch. 127, secs. 4, 9 (The Devolution of Estates Act).....  
*See* WILL, 2.
- R.S.O. 1897, ch. 127, secs. 14, 15, 16...  
*See* DEVOLUTION OF ESTATES ACT.
- R.S.O. 1897, ch. 147, sec. 7.....  
*See* BANKRUPTCY AND INSOLVENCY.
- R.S.O. 1897, ch. 153, sec. 41.....  
*See* MECHANICS' LIENS.
- R.S.O. 1897, ch. 160, sec. 3 (The Workmen's Compensation for Injuries Act).....  
*See* MASTER AND SERVANT.
- R.S.O. 1897, ch. 162, sec. 31.....  
*See* HUSBAND AND WIFE, 1.
- R.S.O. 1897, ch. 166.....  
*See* FATAL ACCIDENTS ACT.
- R.S.O. 1897, ch. 166, sec. 1, sub-sec. 2.  
*See* NEGLIGENCE.
- (The Ontario Companies Act) R.S.O. 1897, ch. 191.....  
*See* COMPANY, 1, 2.
- R.S.O. 1897, ch. 191, sec. 10, sub-sec. 2.....  
*See* COMPANY, 2.
- R.S.O. 1897, ch. 203, sec. 2, sub-sec. 23.  
*See* LIFE INSURANCE.
- R.S.O. 1897, ch. 203, sec. 148 (1) (The Ontario Insurance Act)....  
*See* ACCIDENT INSURANCE, 1.
- R.S.O. 1897, ch. 203, sec. 159 (The Ontario Insurance Act).....  
*See* LIFE INSURANCE, 2.
- R.S.O. 1897, ch. 203, sec. 160 (The Ontario Insurance Act).....  
*See* LIFE INSURANCE, 4.
- R.S.O. 1897, ch. 203, sec. 165 (1)....  
*See* LIFE INSURANCE, 3.
- R.S.O. 1897, ch. 226 (The Municipal Drainage Act), sec. 93.....  
*See* MUNICIPAL CORPORATIONS, 3.
- R.S.O. 1897, ch. 245 (The Liquor License Act).....  
*See* CRIMINAL LAW, 9.
- R.S.O. 1897, ch. 245, sec. 50 (The Liquor License Act).....  
*See* INTOXICATING LIQUORS, 2.
- R.S.O. 1897, ch. 245, sec. 118 (The Liquor License Act).....  
*See* CRIMINAL LAW, 6.
- R.S.O. 1897, ch. 259, sec. 12.....  
*See* INFANT.
- R.S.O. 1897, ch. 338, sec. 5.....  
*See* CONTRACT, 3.
- 1 Edw. VII. ch. 8, sec. 3 (O.).....  
*See* REVENUE.
- 1 Edw. VII. ch. 30, sec. 4 (O.).....  
*See* MUNICIPAL CORPORATIONS, 3.
- 2 Edw. VII. ch. 12, sec. 14 (O.).....  
*See* CRIMINAL LAW, 6—INTOXICATING LIQUORS, 3.
- 2 Edw. VII. ch. 17 (O.).....  
*See* DEVOLUTION OF ESTATES ACT.
- 3 Edw. VII. ch. 19 (O.) (The Consolidated Municipal Act, 1903)....  
*See* MUNICIPAL CORPORATIONS, 2—MUNICIPAL ELECTIONS.
- 3 Edw. VII. ch. 19, secs. 148, 204 (O.)  
*See* MUNICIPAL ELECTIONS.
- 3 Edw. VII. ch. 19, sec. 637.....  
*See* WAY.
- 3 Edw. VII. ch. 19, sec. 641 (O.).....  
*See* MUNICIPAL CORPORATIONS, 2..
- 3 Edw. VII. ch. 19, sec. 668, sub-sec. 4.....  
*See* MUNICIPAL CORPORATIONS, 1.
- 4 Edw. VII. ch. 7, sec. 3 (O.).....  
*See* MINES AND MINERALS, 2.
- 4 Edw. VII. ch. 10, sec. 23 (O.).....  
*See* CRIMINAL LAW, 6—INTOXICATING LIQUORS, 3.
- 4 Edw. VII. ch. 23, sec. 10(1) (e) (Assessment Act).....  
*See* ASSESSMENT AND TAXES, 2.
- 5 Edw. VII. ch. 6 (O.).....  
*See* REVENUE.

- (The Mining Act, 1906) 6 Edw. VII. ch. 11. ....  
*See MINES AND MINERALS*, 1, 2.
- 6 Edw. VII. ch. 11, secs. 109 and 119 (O.) .....  
*See MINES AND MINERALS*, 2.
- 6 Edw. VII. ch. 11, sec. 119 (O.)....  
*See MINES AND MINERALS*, 1.
- 6 Edw. VII. ch. 11, secs. 2(16), 3(1), 5, 188 to 221 (O.).....  
*See MINES AND MINERALS*, 3.
- 6 Edw. VII. ch. 30, sec. 3 (O.).....  
*See CRIMINAL LAW*, 1.
- 6 Edw. VII. ch. 31, sec. 16 (The Ontario Railway and Municipal Board Act, 1906).....  
*See ONTARIO RAILWAY AND MUNICIPAL BOARD*.
- 6 Edw. VII. ch. 31, sec. 51, sub-sec. 3 (O.) (Ontario Railway and Municipal Board Act, 1906).....  
*See ASSESSMENT AND TAXES*, 2.
- R.S.C. 1906, ch. 1, sec. 15.....  
*See RAILWAY*, 7.
- R.S.C. 1906, ch. 7, secs. 5, 12, 13, 87..  
*See PARLIAMENTARY ELECTIONS*.
- R.S.C. 1906, ch. 22.....  
*See CRIMINAL LAW*, 4.
- R.S.C. 1906, ch. 29, secs. 37 and 38 (Bank Act) .....  
*See BANKS AND BANKING*.
- R.S.C. 1906, ch. 34 (The Insurance Act) .....  
*See LIFE INSURANCE*, 2.
- R.S.C. 1906, ch. 37 (The Dominion Railway Act) .....  
*See RAILWAY*, 5, 6, 10.
- R.S.C. 1906, ch. 34, sec. 155.....  
*See RAILWAY*, 3.
- R.S.C. 1906, ch. 37, secs. 254, sub-sec. 4, 294, 295(e), 427, sub-sec. 2 .....  
*See RAILWAY*, 9.
- R.S.C. 1906, ch. 37, secs. 284(7), 340.  
*See RAILWAY*, 4.
- R.S.C. 1906, ch. 37, sec. 294.....  
*See RAILWAY*, 6.
- R.S.C. 1906, ch. 37, sec. 294(4).....  
*See RAILWAY*, 1.
- R.S.C. 1906, ch. 37, sec. 298.....  
*See RAILWAY*, 7, 8.
- R.S.C. 1906, ch. 37, sec. 345.....  
*See RAILWAY*, 5.
- R.S.C. 1906, ch. 37, sec. 414.....  
*See CRIMINAL LAW*.
- R.S.C. 1906, ch. 119, sec. 131 (Bills of Exchange Act) .....  
*See PROMISSORY NOTE*.
- R.S.C. 1906, ch. 139, sec. 48(e), 69, 71.  
*See SUPREME COURT OF CANADA*, 1, 2.
- R.S.C. 1906, ch. 144 (Winding-up Act).....  
*See COMPANY*, 3—*LIFE INSURANCE*, 2.
- R.S.C. 1906, ch. 144, sec. 123 (Winding-up Act) .....  
*See COMPANY*, 6, 7.
- R.S.C. 1906, ch. 145, sec. 4(5) (Canada Evidence Act) .....  
*See CRIMINAL LAW*, 7.
- R.S.C. 1906, ch. 146 (The Criminal Code), secs. 577, 653 .....  
*See CRIMINAL LAW*, 8.
- R.S.C. 1906, ch. 146, sec. 786 .....  
*See JUSTICE OF THE PEACE*.
- R.S.C. 1906, ch. 146, secs. 238, 239, 773.....  
*See CRIMINAL LAW*, 2.
- R.S.C. 1906, ch. 146, secs. 238(j), 715, 722.....  
*See CRIMINAL LAW*, 3.
- R.S.C. 1906, ch. 146, secs. 521, 583, 602, 778(3) .....  
*See CONVICTION*.
- R.S.C. 1906, ch. 146, sec. 1123.....  
*See CRIMINAL LAW*, 9.
- 7 Edw. VII. ch. 4 (O.) .....  
*See MUNICIPAL ELECTIONS*.
- 7 Edw. VII. ch. 9(O.) (The Supplementary Revenue Act, 1907)....  
*See MECHANICS' LIENS*.
- 7 Edw. VII. ch. 10, sec. 2 (O.) .....  
*See REVENUE*.
- 7 Edw. VII. ch. 13 (O.) (The Mines Act, 1907) .....  
*See MINES AND MINERALS*.
- 7 Edw. VII. ch. 13, sec. 33 (O.)....  
*See MINES AND MINERALS*, 1.



- 7 Edw. VII. ch. 15 (O.) .....  
*See MINES AND MINERALS, 3.*
- 7 Edw. VII. ch. 23, sec. 8 (O.) .....  
*See HUSBAND AND WIFE, 1.*
- 7 Edw. VII. ch. 34, secs. 95(1), 99,  
 and 100.....  
*See COMPANY.*
- 7 Edw. VII. ch. 36, sec. 1 (O.) .....  
*See LIFE INSURANCE.*
- 7 Edw. VII. ch. 36, sec. 3 (O.) .....  
*See DEATH.*
- 8 Edw. VII. ch. 21, sec. 71 (O.) .....  
*See CONTRACT, 3.*
- 8 Edw. VII. ch. 34 (O.) .....  
*See CRIMINAL LAW, 6, 9.*
- 8 Edw. VII. ch. 54, sec. 11 (O.) ....  
*See LEASE.*
- 8 Edw. VII. ch. 80 (O.) .....  
*See ONTARIO RAILWAY AND MUNI-  
 CIPAL BOARD.*

### STREET RAILWAYS.

*Negligence—Front Vestibule—Closing of—Requiring Entrance of Passengers by Rear of Car—Order of Railway and Municipal Board—Injury to Passenger in Attempting to Enter by Front Door—Terms of Order—Necessary to Give Notice of—Finding of Negligence on One Ground—Effect of Negativ- ing Negligence on Other Alleged Grounds.]—In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of each of the defendants' cars was en- closed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and, while she was so doing, the car started and she was thrown to the ground*

and injured. She asserted that the motorman saw her standing on the step, and not- withstanding started the car. There was no notice on the door notifying the public of the non- admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) start- ing the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non- admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence.

A Divisional Court, on ap- peal, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obey- ing the board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence.

The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negating negligence on the other alleged grounds. *Mc- Grow v. Toronto R.W. Co.*, 154.

### SUCCESSION DUTY.

*See REVENUE.*

### SUMMARY JUDGMENT.

*When Valid Defences are Sworn to on Motion for, Uncon-*

*ditional Leave to Defend should be Granted.] — See COUNTY COURT APPEAL.*

### SUPREME COURT OF CANADA.

1. *Leave to Appeal to—Jurisdiction of Court of Appeal—Supreme Court Act, secs. 48(e), 69, 71—Extension of Time for Appealing — Amount Involved — Special Circumstances — Difference of Opinion in Court of Appeal.]—*The Court of Appeal has jurisdiction, under sec. 48 (e) of the Supreme Court Act, R.S.C. 1906, ch. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under sec. 71, to extend the time for appealing, even after the sixty days allowed by sec. 69 have expired.

The Court (MEREDITH, J.A., dissenting) refused leave to appeal from the judgment in 17 O.L.R. 530, deeming that there were no special circumstances which would take this case out of the general rule that litigation involving no more than the sum of \$1,000 should cease with the rendering of judgment by the Court of Appeal.

The mere fact of a difference of opinion among the members of the Court is not, in itself, a sufficient reason for treating a case as exceptional. *Milligan v. Toronto R.W. Co.*, 109.

2. *Leave to Appeal to—Jurisdiction of Court of Appeal—Supreme Court Act, secs. 48(e), 69, 71—Extension of Time for Appealing—Appeal Quashed in Supreme Court — Argument on Merits.]—*The Court of Appeal has jurisdiction, under sec. 48

(e) of the Supreme Court Act, R.S.C. 1906, ch. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under sec. 71, to extend the time for appealing, even after the sixty days allowed by sec. 69 have expired.

The Court (MEREDITH, J.A., dissenting) refused leave to appeal from the judgment in 16 O.L.R. 386, after the time for appealing had long expired, notwithstanding that an appeal to the Supreme Court of Canada, launched without leave, had been argued in that Court upon the merits before being quashed for want of jurisdiction: see *Grimsby Park Co. v. Irving* (1908), 41 S.C.R. 35. *Irving v. Grimsby Park Co.*, 114.

### TRIAL.

*Place of, Named in Writ of Summons not Specially Indorsed has no Binding Effect.] —See VENUE.*

### VENDOR AND PURCHASER.

*Bond by Owner of Land — Charge on Land.] —* J.E., the owner of certain land, executed a bond (which was registered) whereby, for himself, his heirs, executors, or administrators, he covenanted that, on his effecting a sale of the land, which, however, was to be entirely at his option, he would pay to A.E. half the purchase money. He died without having effected a sale; and subsequently A.E. died. J.E. by his will devised the land to I.E. for life, with remainder in fee to L.D.E., and they both

joined in an agreement to sell to D.:—

*Held*, without deciding whether the bond was in force as between J.E. and A.E.'s representatives, that it did not constitute a charge on the land, the liability thereunder being merely of a personal character.

*Baker v. Trusts and Guarantee Co.* (1898), 29 O.R. 456, distinguished. *Re Eagan and Dawson*, 638.

See SALE OF LAND.

### VENUE.

*Naming Place of Trial in Writ of Summons — Nullity.*] — The mention of a place of trial in a writ of summons not specially indorsed has no binding effect, and the plaintiff is free to name another in his statement of claim. *St. Mary's and Western Ontario R.W. Co. v. Webb*, 336.

### VOTERS' LISTS.

*Must not only be Certified by the Judge but Transmitted to the Clerk in Order to be Used at a Municipal Election.*] — See MUNICIPAL ELECTIONS.

### WARRANT.

*Of Coroner, for Arrest of a Witness Disobeying a Summons cannot be Executed out of his County.*]—See CORONER.

*Of Commitment, Bad, as no Allegation of Conviction.*]—See CRIMINAL LAW, 9.

### WAY.

*Jurisdiction of Municipal Council—Closing Part of Highway Extending into other Municipalities—Consolidated Munici-*

*pal Act, 1903, sec. 637*—"Wholly within the Jurisdiction of the Council."—By sec. 637 of the Consolidated Municipal Act, 1903, the council of every county, township, city, town and village may pass by-laws, (1) for . . . stopping up roads . . . wholly within the jurisdiction of the council:—"

*Held*, that the word "wholly" is used with reference not to the locality of the road, but to the jurisdiction of the council over it; and the council of a municipality has jurisdiction to pass a by-law closing part of a continuous highway passing through that municipality and extending into other municipalities.

*In re Falle and Township of Tillsonburg* (1873), 23 C.P. 167, followed.

*Hewison v. Township of Pembroke* (1884), 6 O.R. 170, commented on. *Re Taylor and Village of Belle River*, 330.

### WILL.

1. *Devise of Rents to Wife, Subject to Annuity—Death of Annuitant—Amount of Rent Payable to Wife — Amount Raised to Pay Debts—Proportion of same.*]—A testator, after directing payment of his debts, bequeathed to his wife his household furniture, and the "balance of the rents arising or accruing" from his homestead farm, after payment thereof and therefrom of \$200 per annum to a daughter during her lifetime. He then devised the farm to two grandsons, who "were not to receive or to be allowed the possession thereof" until after his wife's death. The testator owned another farm, which he devised



to another daughter. The daughter died in the lifetime of the testator. The executor, for the payment of debts, was obliged to raise \$200, while for the repairs of the homestead farm, a yearly expenditure of \$30 would be required:—

*Held*, that the widow was entitled to the whole of the rent of the homestead farm, subject to any expenditure for repairs, and that the annuity to the daughter did not fall into the residuary estate.

*Held*, also, that the amount raised for the payment of debts, was chargeable on the whole of the testator's realty proportionately to the respective interests of the parties in the two farms. *Re Brown Estate*, 245.

2. *Construction—General Bequest of Personality*—"Goods and Chattels"—"Book Debts"—*Intestacy as to Part of Realty*—*Absence of Direction as to Payment of Debts*—*Payment out of Personality*.]—The testator bequeathed to his wife "all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate," etc.:—

*Held*, that the testator's book debts were covered by the general words in the will "all goods and chattels whatsoever and wheresoever," and that there was no context which interfered with that construction.

Decision of CLUTE, J., affirmed.

The will dealt with certain lands and all the goods of the testator. The goods were given by general (not by specific or residuary) bequest to the widow, and nothing was said in the will as to payment of debts. The

testator left some real property not mentioned or included in the will, and as to which he died intestate. As against the widow, it was contended that the debts should be paid out of the personality in exoneration of the lands descended:—

*Held*, that, notwithstanding the Devolution of Estates Act, secs. 4 and 9, the personal estate is still the primary fund for the payment of debts.

*Re Hopkins Estate* (1900), 32 O.R. 315, *Re Tatham* (1901), 2 O.L.R. 343, and *In re Moody Estate* (1906), 12 O.L.R. 10, approved.

And in this will no sufficient indication was to be found of the testator's intention to relieve the personality from the payment of the debts. *Re McGarry*, 524.

3. *Express Revocation by Subsequent Document—Validity of Document as a Will, notwithstanding Invalidity of Bequests—Relationship of Witnesses to Legatees—Mode of Revoking Wills—Evidence of Intent, when Admissible—Dependent Relative Revocation*.]—A testatrix, by a holograph will, after directing her executors to pay her debts and funeral charges, gave to them the residue of her estate, in trust to pay certain legacies therein provided for, which included legacies to her sister E. A. R. and her nephew E. B. F. R., and to pay the residue, if any, to the said E. A. R. By a holograph document, written under the will, she revoked her will, and gave to E. A. R. all the money she possessed, save the legacy to E. B. F. R. This was witnessed by the husband



of E. A. R. and the wife of E. B. F. R.:—

*Held*, that, while the effect of the relationship of the witnesses to the beneficiaries was to nullify the bequests made to them, the document was, in other respects, valid as a will, and duly revoked the original will, including the appointment of executors.

Judgment of Winchester, Surrogate Court Judge, reversed.

*Re Tuckett* (1907), 9 O.W.R. 979, overruled.

The mode of revoking wills, the admissibility of parol evidence of intent, and the doctrine of dependent relative revocation, discussed.

The Court directed the issue of letters of administration with the will annexed, and the division of the estate as upon an intestacy. *Freel v. Robinson*, 651.

### WINDING-UP ACT.

*Inquiry on Settling List of Contributories.*]—See COMPANY, 3.

### WITNESSES.

*Demeanour of, Considered by Trial Judge.*]—See HUSBAND AND WIFE, 2.

### WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT.

### WORDS.

*"Abandoned."*]—See INFANT.

*"All goods and chattels."*]—See WILL, 2.

*"At large."*]—See RAILWAY, 9.

*"Book debts."*]—See WILL, 2.

*"Competent person."*]—See RAILWAY, 6.

*"Contrary to the statute in such case made and provided."*]—See CRIMINAL LAW, 1.

*"Crops."*]—See RAILWAY, 8.

*"Crops, lands, fences, plantations, or buildings and their contents."*]—See RAILWAY, 7.

*"Deserted."*]—See INFANT.

*"For pasturing purposes."*]—See LANDLORD AND TENANT, 3.

*"Grazing."*]—See LANDLORD AND TENANT, 3.

*"Habitual frequenter."*]—See CRIMINAL LAW, 2.

*"Lands."*]—See RAILWAY, 7.

*"Legal heirs."*]—See LIFE INSURANCE, 1.

*"Occupant."*]—See INTOXICATING LIQUORS, 2.

*"Pasturing."*]—See LANDLORD AND TENANT, 3.

*"Permit."*]—See INTOXICATING LIQUORS, 2.

*"Persons interested."*]—See RAILWAY, 3.

*"Privilege."*]—See ASSESSMENT AND TAXES, 1.

*"Prospectus."*]—See COMPANY, 1.

*"Seize."*]—See RAILWAY, 5.

*"Standing bush."*]—See RAILWAY, 7.

*"Undue influence."*]—See RELEASE.

"Wholly within the jurisdiction of the council." — See WAY.

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#### WRIT OF SUMMONS.

*Service out of Ontario—Construction of Contract—Place of Payment—Parol Evidence—Admissibility—Con. Rule 162 — Conditional Appearance.*]—The plaintiff, resident and carrying on business in Toronto, completed, by letter posted there, a contract with the defendants, who resided in Scotland, under which he was entitled to a certain commission on goods sold in Toronto:—

*Held*, that, on the legal construction of the contract, the place of payment was Toronto, and parol evidence was not admissible to shew the contrary, as by proving that the plaintiff had always drawn on the defendants for his commission, and that such drafts had been paid in Scotland; and therefore an order allowing service of a writ of summons out of Ontario was rightly made under Con. Rule 162; but the defendants should be allowed to enter a conditional appearance.

*Blackley v. Elite Costume Co.* (1905), 9 O.L.R. 382, followed. *Nixon v. Jamieson*, 625.

















